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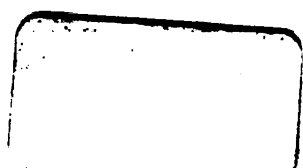
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THE
H I S T O R Y
OF THE
BOROUGH
AND
MUNICIPAL CORPORATIONS
OF
THE UNITED KINGDOM,
FROM THE EARLIEST TO THE PRESENT TIME:

WITH AN
EXAMINATION OF RECORDS, CHARTERS, AND OTHER DOCUMENTS.
ILLUSTRATIVE OF THEIR CONSTITUTION AND POWERS.

BY
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HISTORY

OF

CORPORATIONS.

JAMES I.

THE transmission of the crown from the house of Tudor to that of the Stuarts, was accompanied by little or no sensation, owing both to the character for moderation and wisdom which the king possessed, and to the preparation which the public mind had undergone during the latter part of the late queen's reign for the change of succession.

1603
to
1625.

It was the obvious policy for the successor of such a queen, ascending the throne, in some respects, in the character of a foreigner, to preserve public affairs in the position they occupied at his accession. James was so much actuated by this principle, that he is said to have pronounced it as a maxim, "that no prince should begin any considerable undertaking in the first year of his reign;" and he continued for some time, and to some extent, the same measures which Queen Elizabeth and her immediate predecessors had begun—and at the commencement of his reign he added, as we shall see hereafter, some few places to the list of boroughs which returned members to Parliament; and restored others to this privilege.

He, however, at last experienced the evil to which we have before alluded; and found the greatest difficulty in managing the House of Commons, from the number of its members.

James I.

When therefore it was suggested to him to add to the number of the boroughs, his practical and peremptory answer was, "that he had too many already."

Still at some periods of his reign the Parliament were sufficiently compliant to his will, and submitted patiently to many strong exertions of the prerogative of the crown.

The chancellor in some instances exercised a discretionary power in issuing writs to fill up vacancies in the House of Commons—but at last this branch of the prerogative was abandoned.

However, in the beginning of his reign, the king, on calling a Parliament, issued a proclamation, threatening with fine and imprisonment any who should take upon themselves the place of knight, citizen, or burgess, not being duly elected. And he, through his council, ordered a member of the House of Commons to be banished the House; and a new writ issued to supply his place.

So strong was the supposition of the king's disposition to control the Parliament, that the Commons adopted the rumour that some persons called "undertakers," attached to the king, had laid a regular plan for the new elections, and having spread their influence all over England, had undertaken to secure a majority for the court.*

These measures or suspicions naturally begot a spirit of resistance in the Commons: and they began to dispute the prerogative of the crown, and to assert their own independence.

Thus, increasing their power and importance, a seat in the House, instead of being considered a burden, began to be an object of earnest desire: hence the elections were severely contested, and the ascertaining who were the real burgesses, and had the right of election in the several boroughs, began to be a consideration of vital interest.

This imperceptibly led to the formation of the learned and powerful committee of elections, which sat during the latter part of this reign: whose decisions were reported by Mr. Serjeant Glanville, as well as in the Journals of the House:†—

* 5 Parl. Hist. 286; Journ. 12th April, and 2nd May, 1614.

† Journal, 3d July, 1607.

which at this time were specially ordered to be regularly kept. James I.
 In the decisions of this committee—one of the distinguishing features of this period—(upon which we shall hereafter observe more fully in detail) broke out that spirit of sober liberty which had taken possession of the House; and the leading members, men of genius and extensive views, were desirous of establishing the law of elections on sure and fixed principles. And as to the rights of Parliament in general, the House insisted upon freedom of speech—and that their liberties—franchises—privileges, and jurisdiction, were the ancient and undoubted birthright and inheritance of the subjects of England.

It must however be remembered, that in the midst of their resistance to the abuses of the power of the crown, many of the wisest and most prudent members retained, and openly avowed, their due regard for the just and legal prerogative of the king: and were most desirous to keep their proceedings and remonstrances under the strictest restraints of decorum and propriety.

But the wide field of historical discussion is not our province:—we wish rather to confine ourselves strictly to the subject of our inquiry, and to the collection of the records and documents which directly bear upon it, to the enumeration of which we proceed.

STATUTES.

The Statutes of this reign containing, with one or two exceptions, nothing material to our inquiry, will afford only a few short extracts.

We have lately observed the continuance of the *courts-leet* Court leet.
 during the reign of Queen Elizabeth.

The fifth chapter of the second year of James I. relates to the same subject:—and after reciting, that the jurisdiction of the *leet* and *court baron* was for the true administration of justice, and for the punishment and suppression of offences; and that the *stewards* had obtained grants of the fees and profits 1604.
Cap. 5.
Stewards.
 of these courts for their private gain;—prohibits the same for the future.

James I.

1607.

Some cases of this period relate to the same subject:—thus from Buller's case,* in the fifth year of James I., we find the origin, nature and practice of the *court-leet* most accurately defined. And although it appears at the close of the report to be assumed, that the court had in some degree become obsolete; yet it is obvious—from the above statute—from this case—and from others which occurred in this reign—that the court was still in existence, and maintained its ancient jurisdiction—excepting where, in a few instances, the general scope of its authority had been interfered with by the legislature; or by usage it had varied in some of its forms. And although it is asserted, that the case was intricate and involved in much doubt, yet from the documents we have before quoted, the dilemma, if any, must have arisen from a disinclination to attempt to overcome the apparent difficulty.

Leet.

Sheriff's
tourn.Chief
pledge.

Judgment.

It was agreed, that the *lord of a leet* might well have a certain sum, as 10s. pro certo letæ of *all the resiants* within his leet,† called sometimes “*capitagium*,” &c. and sometimes “*certum letæ*,” and by other names;—and it might have a reasonable beginning; scil. when the lord purchased and acquired the *leet* for the ease of the *resiants* therein; so that they need not go to the *sheriff's tourn*; but do their suit real at the lord's *leet*. Also the lord of a leet was at every eyre obliged, at his own costs, to claim this franchise, &c. And in the case at bar, the issue was, whether the plaintiff at the court leet mentioned in the record, was a “*chief pledge*” of the same court or not. And thereupon a special verdict was found, that the plaintiff was *resiant*; and that he was certified in the leet to be a “*chief pledge*,” by the chief pledges there. But he made default, and was amerced 2s. 6d.; so that he did not appear, nor was *sworn* as chief pledge, &c. And it seemed to the court, that they could not adjudge him a chief pledge upon this verdict. For leets were divided in *decurias* or *decennas* (*unde dicitur decennari* to this day) and out of *every ten* (*each of them being pledge*

* 6 Co. 78. A. D. 1607.

† And see also the court leet, mentioned Godb. 179. 8 James I.

for the other, from whence the court was called "*curia visus franci plegii*," one was called "*capitalis plegius*;" seu primarius fidei jussor. And in some places, at this day, he is called the "*tythingman*." And in Yorkshire, "*tenmantale*." And therewith agreeth Lambert in his book, "*De priscis Anglorum Legibus*:"—and Fleta, lib. ii. c. 45. And reason proves it; for he cannot be called capital pledge, but in respect that others are inferior pledges. Vide the statute of 28 Edw. II. de visu franci plegii—of chief pledges; and our books speak of chief pledges. Vide 4 Edw. III. 125, 126;—and 4 Edw. III. 30;—45 Edw. III. 23;—so that the return of the constable, or the presentment of the jury in the *leet*, doth not make a man chief pledge. For it appears by the said act of 18 Edw. II., that "it ought to be inquired at the leet, if all the chief pledges, with their decenners—that is, the other nine—appear." By which it seems that the tenth principal man was the "chief pledge;" and vide 30 Edw. III. 23, of the frankpledge of the town, and its authority.

In another report of the same case,* the *chief pledges* were *fin*ed by the *steward* for refusing to be present at the *court leet*, which amercement was held good.

Leet.

In the course of the argument it was admitted, that before there was any leet, the *sheriff's tourn* existed; but that the lords of the hundred purchased a leet for the ease of the *inhabitants* within the hundred; and that whenever a charge was to be imposed, it should be upon all the *inhabitants*.

Tourn.

Inhabitants

The principle in this case was laid down, "that when any thing ought to be done by the common law, the common law gives a power to punish; but where a thing commences by a custom, the custom ought to give the remedy."

It was also stated, that *the leet was the greatest court the king had* during the Saxon æra. That any one might with safety travel with money without protection: for if a person was suspected, he was immediately compelled to find pledges for his good behaviour.

The following case, also in the 16th of James I., will show

18.

* 2 Rolle's Rep. 32 & 73.

James I. that the doctrine of the *leet* was at that time fully understood
1618. and practised.

In replevin* the defendant avowed, because he had a
Leet. *leet* of all the *inhabitants* and *resiants* within his manor; and the plaintiff, being an *inhabitant*, was *summoned to appear* at the leet, and having made default, was *amerced*.

It was admitted, that all *churchmen—women—noblemen—knights*—and their eldest sons—were free of this service. But that all others above the age of 12 years ought to do their suit and service, which was called "*suit real or royal*." For although the lord had the benefit of the court, yet *the court was for the king*. And the service done was the service of the king.† And the *lord cannot grant that one should be discharged of his suit at the leet*. In a subsequent part of the case it was noted, that *the king could not release a person from doing suit at the leet*, as it would be to the prejudice of the lord.

It might also have been added, that it would have been in derogation of the common law.

In the case of *Cook v. Stubbs*‡ it was expressly laid down,
Leet. "that *every man ought to be within a leet, and none could be of two leets*."

1623. It was also held in the 21st of James I.,§ that "a *court leet* could make bye-laws; not only touching husbandry, "but also touching trades and mysteries."

Cap. 14. The 14th chapter of the statutes of the same year provided
London. remedy for the *freemen* of *London* to recover their debts; and prohibited—as is the case in many charters and bye-laws—that they should sue any other freeman out of the city.

p. 28. The 28th chapter in the same year, is a confirmation of the king's letters patent, granted to the mayor, bailiffs and bur-
gesses of *Berwick-upon-Tweed*, and the franchises and liberties of the borough.

16 Subsidies were granted at the close of the last year, as well as in this, and so continued during the whole reign; the

* 2 Rolle's Rep. 56.

‡ Cro. Jac. 583.

† See before, Congleton.

§ Rolle's Rep. 391.

last subsidy being granted, amongst other things, for the decayed cities and towns; accompanied with the usual confirmation of the king's general pardon. James I.
Subsidies.

In the 10th year of James I., the act passed in furtherance of the king's favourite project, for the repeal of hostile laws, and all hostilities between England and Scotland; upon condition of a similar repeal in England. 1612.
Scotland.

The 10th chapter of the same year contains a confirmation of the charter granted by Henry VI. to the mayor, bailiffs and burgesses of the town of *Southampton*—all merchants, not being free of that town, and all *strangers*, being restrained from buying or selling in the town. Cap. 10.
Southampton.

CHARTERS.

King James, in the third year of his reign, granted a charter to the city of London, referring to the office of bailiff, and the conservancy of the water of the Thames, from Staines bridge to Yean Leet; and also the measuring of coals, grain, &c. And that the mayor, *commonalty*, and *citizens*, had been disquieted in such measuring, particularly in that of coals—to remove all doubts respecting the same, the king certified and confirmed the offices of measuring to the mayor, *commonalty*, and *citizens*, with the conservancy of the Thames. London.
1605.

And in the sixth year of James I., that king granted a general confirmation of all charters and privileges, to the mayor and *commonalty*, and *citizens*, by whatsoever name of incorporation* they were before granted or confirmed; and the search and surveying of oil, hops, soap, salt, &c., and the measuring of all corn, &c., were expressly granted by that charter. 1608.
Second
charter.

Incorporation.

All the *inhabitants* and *dwellers* within the city, are placed under their rule, government, jurisdiction, and oversight, as well as the present and future *inhabitants* of the Black Friars and White Friars, both of which, with the whole Inhabitants

* These words appear to be the first time applied to the corporation of London; though they had been applied, in the second year of this reign, to Maidstone, in a charter to that place.

James I. precincts, circuit, and compass, and all buildings therein,
 1608. are to be quit of all taxes and other burdens, &c., and *watch*
 Watch and ward. and *wards*. And the *inhabitants* are to be exempted from
 the offices of constable and scavenger, and other offices of
 charge within the city, without the limits of the Black Friars
 and the White Friars. But all *freemen inhabiting* within
 Freemen. them, are to be eligible, like other *freemen*, to all offices; of
 mayor, sheriffs, and aldermen, as of the company of which
 they shall be free. And all persons, though not free of the
 city, who *dwell* within the city, (except the *inhabitants* within
 Black Friars and White Friars,) shall be reasonably taxed,
 and contribute to all aids, talliages, and other contributions,
 to be levied by the mayor, *commonalty*, and *citizens*—pro-
 vided that such *residents and dwellers* in any *houses** within
 the city, who are not, or *will not be*, freemen of the city, shall
 be taxed to such aids and talliages only for the *houses* in
 which they shall *inhabit* or *reside*, or are *dwelling*—with
 power for them to appeal to the chancellor, if they should
 think themselves unjustly grieved.

Justices. The mayor, recorder, and aldermen who have borne the
 charge of mayoralty of the city, are to be justices of the
 peace: other keepers of the peace not intermeddling. And
 the sheriffs of the city are to be aiding and assisting to the
 mayor, recorder, and aldermen.

1614. In the 12th year of James I., the king granted a charter to
 the mayor, *commonalty*, and *citizens*, confirming to them the
 weighing of all coals, &c., in the port of London; and fixing
 the fee at 8*d.* for every ton, for the costs of the mayor, com-
 monalty, and citizens, in the beam and weights, and for their
 attendance; labour, and necessary expences, and for the
 prevention of forestalling. All persons are prohibited from
 selling any coals upon the waters of the Thames in any boats
 or lighters, but only in the ships in which they are first
 brought to London.

We have seen, in the reign of Queen Elizabeth, to what
 an extent it had been stated in the charters, contrary to the

* This shows clearly, that the persons who were to contribute to the aids of the
 city, were the *householders*.

fact, that the places to which the grants were made, had been James I.
 immemorially incorporated. It appears that the same doc- 1614.
 trine had spread into the courts of law. And thus, in the
 case of Day and Savage, in the 12th year of James I.,* the
 defendant pleaded, "that London was an ancient city, and so
 had been time out of mind; and that the mayor, citizens, and
 commonalty had been, by all that time, a corporate body;"
 though undoubtedly the fact was not so.

In the books of the city,† it appears, during this reign, 1607.
 that a poor *inhabitant* of Aldgate was, at the request of the
 other *inhabitants*, admitted by redemption into the Merchant
 Taylors' Company, paying 6s. 8d.

Another provision was made for restricting the number of 1614.
 redemptioners,‡ so as they should not exceed 36 yearly;
 and that no grant of freedom should be made but in *full*
court;—13 at least being present.

The Cordwainers' Company were allowed to name 20 shoe-
 makers, *English born*,§ to be admitted by redemption, or
 fines of 6s. 8d.; so that they were presented to, and allowed
 by the court of aldermen.

At this period,|| a committee was appointed to consider as 1621.
 to the granting of freedom by redemption, whether by the Freedom.
 court of aldermen, or common council only; and what num-
 ber were to be granted yearly by the court of aldermen.

The following is an extract from a document in the Cot- 1608.
 tonian Library,¶ relative to "the government of the city of
 London, and the dignity of the aldermen." And it will be
 seen, that in conformity with the cases which we have before
 quoted from the Year Books, it describes the *inhabitants* as
 the *commons* of the city. Commons.

"The city of London is a corporation, privileged from
 much of the ordinary course held throughout the kingdom,
 and endowed with many liberties and immunities, first
 granted through special favour of the kings of this realm,

* Hob. 116.

† Rep. 28, fol. 114.

‡ The redemptioners were those who were made by redemption, as it was called
 —that is, on the payment of a fine.—Rep. 30, fol. 2 b.

§ Jor. 29, fol. 297 b.

|| Jor. 31, fol. 352.

¶ Bibl. Cotton., Vespasian C. 14, p. 314.

James I. and afterwards confirmed by divers acts of Parliament, as
 1608. aiming at the benefit and honour of the state; which the
 Inhabitants industry and loyalty of the *inhabitants* hath so well answered,
 that the place hath thereby gained the name of the king's
 chamber.

“ The government of this city dependeth chiefly upon the
 Mayor. *mayor*, as the king's lieutenant—and secondarily, upon the
 Aldermen. *aldermen*, as subordinate magistrates, to govern the several
 Wards. divisions or *wards* of the same, whereof (by like authority
 granted from sovereign majesty) they are made keepers.
 Inhabitants And to these aldermen is left the rule of the *inhabitants*
 residing in the same, which are known by the name of the
 Commons. *commons* of the city.

Guilds. “ The body of the commons is divided into *guilds* or *com-*
panies, which are antiently ranked in degrees of priority or
 precedence, according to the worth of their trades or
 misteries.

“ And the brethren of every guild have their places in the
 company, either according to their seniority, or as they held
 offices in the same.”

After which, this document proceeds at great length, to
 give the order of precedence to be observed in going to
 Westminster.

1614. In the 12th year of James I., an important case relative to
 London occurred, upon an information for prisage, instituted
 Waller v. by Sir Thomas Waller against Frances Hanger, widow, for
 Hanger. prisage of wines brought in ~~from~~ ^{four} ships—two of which she
 alleged arrived in the lifetime of her husband; and two after
 his death;—and he appointed the defendant his executrix.

Free woman. In answer, she alleged that she was a “ *free woman* ;” and
 claimed to be discharged from prisage, under the exemption
 granted by the charter of the first of Edward III.,* to the
 mayor, *commonalty*, and *citizens* of London. And she said,
 that her husband was a “ *citizen*”† AND “ *freeman*” of the
 city of London, of the Company of Cloth-workers. And

* See before, p. 630. 2 Bulst. 134, 261. 3 Bulst. 1.

† This is another instance of the distinction we have before taken, with reference
 to the ancient *liber homo*—*citizen*—or *burgess*—and the person who, by reason of
 his belonging to any fraternity, was *free to trade*.

she alleged, that the city was an ancient city;—which was strictly correct. But when she also added, that it was incorporated, by the name of “mayor and commonalty”—that, for the reasons we have shown, was clearly without foundation. James I.
1614.

To her plea, the king’s attorney-general demurred; and in stating the case, Bulstrode, the reporter, says, that the *merchants, freemen, citizens, and residents* in London, were, by that charter of Edward III., discharged from the payment of prisage. And the question was, Whether these wines should be so discharged? The case was argued in different terms for two years; and the judges being divided in opinion, gave their judgments severally.

Croke, justice, was of opinion, that the exemption ought to be construed largely. And that it would extend to citizens, men or women. That women were not to be excluded from the benefit of the charter; for the widow of a merchant citizen was a citizen, and should have the same privilege as her husband, as long as she was *resiant* in the city. And he said it was not sufficient that a person was *born*, or had come to the place; but he ought to be a *citizen, resident and commorant—an inhabitant of the place* (*civis residents et commorans, incola civitatis*). Resiant.
Resident. A woman may be a citizen; but in this case she is not an owner. If a citizen makes a foreigner his executor, who unlades the wine, he shall not have the benefit of the discharge; for a foreigner is not entitled to it: he is not “*civis*,” nor are the wines “*bona civium*.”

Letters patent of the king ought to be construed *secundum intentionem domini regis; et non ad deceptionem*. Charters.

If the widow had the wines in her own right, she should have the discharge; but as in right of another, she shall not. And Knowl’s case, in the fourth of Henry VI., was cited, who removed his household *cum pannis*, and dwelt at Bristol, but kept his *shop* in London, and claimed discharge from prisage. But it was voted against him. For he was not such a *citizen* as could claim the discharge; he ought to be “*civis, incola, commorans*.” In the reign of Henry VI., complaint was made, that the lord mayor of London would

strangers
James I. make *strangers* citizens. And it was declared, that the discharge from prisage did not extend to such citizens as
1614. were "dotati" made free—but to those only who were
Strangers. *commorant*—*incolant*—and *resiant* within the city. And here
Resiant. the widow only pleads that she is a "*libera fœmina*," and not
"civis;" and therefore he held the plea was bad. And
Sacheverel's case, in the 43rd of Elizabeth, was cited, in
which it was determined, that those who were not "*masters
of families*," but had taken *chambers* in the city, and were
freemen, and subject to *scot and lot*, yet could not have the
benefit of the discharge, for they were not "*incolæ*."

So if a citizen merchandise with another, he shall not have the discharge.

A citizen ought to be such, to all purposes and intents; otherwise he shall not have the benefit.

Williams, justice, upon the contrary, thought she ought to be discharged. And he relied upon the case of the mayor of Norwich; and the supposed case of the grant to the good men of Dale, for the purpose of establishing that London was incorporated:—which we have shown not to be the fact, either with respect to London or Norwich, at the period to which the case refers. But he admitted the case of a
Foreigners. *foreigner*. And he said, it was not to be disputed but that a woman might be a citizen. And he cited the 46th of
Citizen! Edward III., fol. 13, that "*he is a citizen who is commorant
and an inhabitant, and subject to pay scot and lot. If he
dwell in another place he shall not be free.*"

And in another part of his judgment, he lays down that
Reason. sound principle of the law, "*that common reason makes the law.*"

Yelverton, justice, was also of opinion, the woman ought to be discharged. But he cited the case of the 21st of Edward IV., to show that the citizens of Norwich, who were to be exempt from serving upon juries, must be members of the city; for that none but citizens were to have any benefit of that immunity; for the words of the grant are, "*pro
melioratione civitatis*," for the advancement of the honour and civil offices. And he referred again to the citizen

who removed to Bristol: and Sacheverel's case, who though he bore *civilia et publica onera*, yet he was not entitled to the benefit; for he was not "*incola*," but only *domicilianus*, or *chamberer*. He was a citizen—a freeman—and *commorant*. But he ought to be "*inquilinus*," and have a house. And he put the case of a person being disfranchised before the arrival of the wines. And spoke of *strangers*, and their claim of exemption. And no person would be entitled by being locally within the city, unless he bore its burdens. And he denied that a woman could be a citizen, (as it appears upon substantial grounds)—for she cannot bear the "*civilia et publica onera*" of the city—she cannot do anything for the benefit of the city—she cannot perform *watch nor ward*, nor bear office in the city. She may be a free woman; but that is only to have her will, as many so have, but to no other purpose.

James I.

1614.

Incola.

Householder.

And Houghton, justice, with reference to the right of the widow to be free, quoted Otes's case,* from the Book of Assise, and from the 45th of Edward III. In which it was said by *Finchden*, that "the citizens to whom the privileges extended, were those who were *born* or *inherited* in the city, or who were *resiant* AND *taxable to scot and lot*; and that he which is not so, shall not be said to be a citizen, unless he is *commorant* and *resiant*, subject to scot for payments, and lot to supply the places and offices, there heritable. And if he be not such a one, he shall not be said to be within the privilege of a citizen." As to the widow, notwithstanding, by the custom of the city, she hath some privilege as to merchandise during her widowhood; and so as to some purpose, shall be said to be a citizen: yet it is only to a certain extent, because she is *not subject to scot and lot*.

Citizen.

Dodridge, justice, in delivering his judgment said, that being a citizen of London hath divers significations:—some are there *inhabiting*: and so in this regard they are called citizens. But if he hath not *jus societatis*, the discharge of prisage would not extend to him.

Inhabiting.

Also, every one who hath *land* in London, by custom, Land.

* Vide ante, p. 633.

James I. may devise it in mortmain ; and yet notwithstanding he is no
 1614. citizen.* A *citizen* is such a one as ought to be subject to
 Scot and lot. *scot and lot*, and he ought to be “ *liber homo*.” Scot and lot
 are particular payments imposed upon every one ; but extends not to one who is *commorant in another place*. He
 Commorant. ought to be a *citizen* and a *freeman*, and also *commorant* there, who is to have benefit of this charter of immunity.

And he cited the case of Knowls,† who was a *citizen* and *freeman* of London, but he left his *commorancy* and dwelt at Bristol, and yet remained a citizen and a freeman, and was eligible to be called into any office ;—there it was adjudged he should not have the benefit of this charter, to be discharged from the payment of prisage, but he ought to be also
 House-keeper. a *housekeeper in London*.! But if he be a *citizen* and *freeman* of London, and do dwell there—as if he keeps no house, but takes a *chamber*, and so is an “ *inmate*,” this charter of discharge shall not extend unto him—and this was adjudged in the Exchequer, in the 43d of Elizabeth.‡ Therefore, it is to be considered what manner of persons ought to be citizens
 Householder. —*freemen*—and *commorant not in a chamber, but to keep a settled house* there ; and this is sufficient for persons capable to have the benefit of this charter of discharge.

Coke, chief justice, observed, that it was a case of great importance, and he brought it under consideration a second time, referring to the division among the judges. He stated that the charter was granted for the advancement of trade and traffic—for the advancement of the navy—and the general amendment of the city. And, in an elaborate division of what citizens are, he says, that “ one may be a citizen in
 Residence. *fact*, and not by *residence*, and such a one is not in judgment of law a citizen : for which he cites 35th of Henry VI., fol. 12 ; 36th of Henry VI., fol. 28, which latter was the instance of a person *not dwelling* in London—and the 4th of Edward IV., fol. 10, where one is mentioned as a citizen of London, and *dwelt* in another place. So, also, if he is *resident* only in name, that is not good. If he be not a *citizen* AND

* 5 Hen. VII. fol. 10 et 19, 45 Edw. III. fol. 26.

† 4 Hen. VI. Rot. 14.

‡ H. T. Rot. 22.

a *freeman* he cannot devise his lands in mortmain ; so if he be but “*inquilinus*” this will not serve his turn—he ought to be a *continuing citizen and resident*. He ought to have “*jus habitationis*; et *jus societatis*.” If in the interim he happens to be *disfranchised*, he shall not have the benefit, for he ought to be a “*continual citizen*.” If all then concur in him, and he *continues* to be “*civis*,” then he is every way complete, and enabled to enjoy the benefit ; for which he cites *Bracton*, fol. 411, which author, he says, comprehends all these in one word, to wit, “*Barones Londini*.”—And it may equally be said, as we have often observed before, that the single term “*burgess*” has the same import.

James I.

1614.
Inquilinus.

Citizen.

Baron.

Burgess.

The reader will perceive that this case throughout confirms the doctrine for which we have contended from the earliest periods of our history ; and it, in truth, brings down the principles connected with the right of citizenship, founded upon the same grounds, to the reign of James I.

The reporter describes the persons entitled to prisage as “*freemen, citizens, and residents*,” which is a most correct description of what such a person ought to be.

Residents.

He should be a “*freeman* ;”—that is of *free condition*—a *liber homo* :—for none other could enjoy the privileges.

Freeman.

He should be a *citizen* ;—that is, he should be *admitted, sworn, and enrolled* at the wardmote :—for otherwise, if not *admitted*, he would not be recognized as a citizen by the public officers or his fellow citizens—nor would he be “*a legalis homo*,” a *lawful man* having given his *pledges* to the law and taken his oath of allegiance.

Citizen.

Admitted.

Sworn.

Again ; though he was of free condition, and had been admitted, enrolled, and sworn, still he would not be entitled to this or any other privilege, unless he continued a *resiant* or *inhabitant householder* within the city.

Resiant.

This doctrine is most expressly and repeatedly laid down by Mr. Justice Croke, and almost in every form of expression, both Latin and English ; properly connecting the *residence*, as an *inhabitant householder*, with the payment of *scot and lot*, which was a necessary consequence of it.

Householder.
Scot and lot.

Mr. Justice Williams asserts the same doctrine, founding

James I. himself upon the authority of the Year Book, which we have
1614. before quoted.*

Mr. Justice Yelverton maintains the same, particularly referring to the *occupation of the house*, and the consequent necessity of bearing the *civil and public burdens* of the city, especially *watch and ward*; and the filling of offices to which he might be elected. He also refers to the Year Book.

Watch
and ward.

Mr. Justice Doddridge most correctly confirms the doctrine we have before asserted, of the loss of the privileges of the city by becoming "*commorant*" in another place; and mentions the requisite of being a *housekeeper*.

Commorant.
House-keeper.

The chief justice, Lord Coke, although his mind was strongly impregnated at that time with the notion of corporations, delivers, in substance, even upon the second consideration of the case, the same opinions, insisting upon the necessity of *residence*—of being of *free condition*—and continuing a citizen by *continual residence*; for all which doctrine he quotes, as we have done before, the ancient authority of Bracton.

Another case, also of considerable importance, occurs in the
1609. 7th year of James I.; nearly at the time at which one of the charters we have before quoted was granted; in which much of the same doctrine was asserted. But the reader will perceive, that it was unwarrantably mixed up with the considerations of "*trade*," and involved with some of the intricate doctrines which have in modern times been applied to corporations. Particularly it will be observed, that the rights by *birth*, *servitude* and *redemption*, were strangely confounded together; as we have before had occasion to note with respect to other places.

Trade.

Corporations.

We shall give a short extract from this case, and close it with a few observations.

City of
London
case.

In the *city of London case*,† the mayor, aldermen, and sheriffs, in a return to a habeas corpus, to bring up the body of James Wagoner, set out the customs of London, stating that they were confirmed by Parliament, and alleging an ordinance made by the lord mayor, aldermen and *commons*,

* See before, p. 633, et seq.

† 8 Co. 241.

in pursuance of their customs, reciting a former in the ^{James I.} third year of Edward IV., which prohibited *foreigners* from ^{1464.} setting up shops within the liberty of the city. And another ordinance, in the 17th of Henry VIII., that no person ^{1525.} being "*estrange*" from the liberties of the city, should ^{Strangers.} keep a shop within them, upon pain of imprisonment and forfeiture. And that sundry strangers and foreigners, not regarding these provisions, but intending their private profit, have devised by all sinister and subtle means, to defraud the charters and ordinances, and secretly sell their wares, &c. within the city, to the detriment of those who *pay scot and lot, bear office, and undergo other charges, which strangers, and other persons not free, are not chargeable withal*: for avoiding which damage it was ordained, that "no person not being free of the city, should, by "any colour, directly or indirectly, sell any wares, nor "keep any shop, nor use any art or handicraft within the "city, upon pain of 5*l.* (with a proviso excepting victuals)" —for non-payment of which forfeiture *Wagoner* had been arrested. And it was resolved, that the custom of London, and their ordinances founded upon it, were good; but that they would not be good by grant, and therefore *no corporation made within time of memory** can have such privilege, unless by act of parliament. And it was adjudged, that a grant to restrain trade and traffic was void, because trade and traffic is the life of every commonwealth, and especially of an island. And therefore the king might erect *gildam mercatoriam*, i. e. a *fraternity or society or corporation of Merchant guild.* *merchants*, to the end that good order and rule should be by them observed, for *the increase and advancement of trade and merchandise*, and not for the hindrance or diminution of it. And *gildan* is a Saxon word, and signifies *solvere*, i. e. that all ^{Gildan.} of such fraternity shall be subject to pay scot and lot: and therefore at this day such part of the country which is contributory among themselves to pay common charges is called the *guildable*;† and if there be any special liberty it is called *Guildable*. the franchise.‡

* All corporations in England are within time of memory.

† See before, in the time of Henry VIII. ‡ 2 Brown, 287, 178; 1 Bul. 195.

James I. It was observed, that one may be liber homo, that is a
1609. freeman of London, by three ways:—

1. Service. 1st. By *service*, as he who serves his apprenticeship.
2. Birth. 2nd. By *birthright*, as he who is the *son* of a freeman of London.
3. Re-
demption. 3rd. By *redemption*, that is by allowance of the court of mayor and aldermen.

And all these three ways are allowed by the custom of the city of London. And by no other means can a man become a freeman of London, for none can be made free of the city of London by charter.* And therefore it appears, that Edward III. granted to John Falcount de Luca, apothecary, citizen of London, “quod ipse omnibus libertatibus quas cives civitatis prædictæ habent in eadem civitate et alibi infra regnum nostrum Angliæ, habeat, gaudeat et utatur; et quod de tribus denariis de libra, et omnibus aliis præstationibus et custumis, quas alienigenæ de bonis et merchandisis suis infra regnum Angliæ solvere tenentur, de propriis bonis et merchandisis ipsius Johannis infra idem regnum et totam vitam suam sit quietus; et quod plus quam alii cives nostri London indigenæ pro custumis merchandisarum, et aliorum bonorum suorum nobis solvunt solvere non teneatur, nec ad hoc, aliquo modo compellatur.”—But all these

Freeman. words do not make him a *freeman* of London, for he ought to attain unto it by one of the said three ways, according to the custom.

It will be seen that this case turns chiefly upon the disability, which has so frequently occurred before in the charters, and the local and municipal documents, of *foreigners* and

Strangers. *strangers* to trade in places to which they did not belong.

Scot and
lot. The ancient Saxon obligation to pay *scot and lot* is

Merchant
guild. is made to the *Gilda Mercatoria*, which many charters and documents have already shown to be *distinct from the municipal government of the place*;† and the members separate from the general class of burgesses.

* Pat. 32 Edw. III.

† Vide ante, pp. 320, 322, 340, 381, 390, 392, 468, 469, 559, 599, 839, 842, 1048, 1049, 1147, &c.

It is said that a person might be a "liber homo," or freeman of London, by three ways; as to "*birth*," and "*servitude*," it is true. The grounds of which respectively we have before shown, and they each undoubtedly made a person of *free condition*.*

James I.
1609.
Liber
homo.

But "*redemption*" stands altogether upon other grounds, and does not directly apply to the question of freedom.

Redemp-
tion.

Redemption is properly the admission of a person into the place upon his being thought fit to be admitted, and paying a contribution to the *common stock* of the town. Such a person ought in strictness to have been of *free condition* before he was admitted into the place. Because if he was a *villain* the inhabitants of the place receiving him might, as we have seen before, be called in question for harbouring him. But his *residence* there for a year and a day without claim might obviate that difficulty:—and, in that point of view alone, his admission *into the place* might be connected with his being of *free condition*. But otherwise the title by redemption has nothing to do with that fact: but proceeds upon the assumption of his being so: and is a mere *permission* to him, as being previously a freeman, to become a freeman of the particular city or borough: and so he is admitted as a *citizen* or *burgess*.

Common
stock.

Villain.

Redemp-
tion.

Permis-
sion.

And in this manner the two cases may be reconciled together upon the principles of the common law; otherwise they would be inconsistent, and lead the mind to that state of uncertainty which too commonly arises from perusing cases of this description, without considering the ancient nature and origin of such rights and usages.

In the last two cases frequent references were made to the confirmation of the customs of London by Parliament, which has been sedulously maintained from that period to the present time.

The assertion is not quite so clear as is usually assumed:—and if it is correct, there are many more places in England which might, if they thought fit, assert the same privilege.

* Vide etiam, post. temp. James I., Newcastle-upon-Tyne.

James I. At all events, the claim must be made by the city of London, subject to the qualification contained in the following case of the 21st of James I.,* respecting an ordinance made by the common council, for the ordering of the company of bricklayers and plasterers; in which it was said that the confirmation, by statute, of the customs of the city of London, extended only to good customs, which were reasonable for the common weal.

Besides the charters to London, granted in this reign, some were conferred upon other places, which it is necessary shortly to mention.

NEWCASTLE-UPON-TYNE.

1603. In the first year of James I., the powers and provisions of the charter of Elizabeth to Newcastle were, with some few omissions, alterations, and additions, repeated and confirmed.

1604. And in the 2nd year of this reign, another charter to Newcastle, recites that disputes between the mayor, aldermen, and common council—and the governors, stewards, and brothers of Hostmen, &c. had arisen:—and in order to put an end to them, the king grants to the mayor and burgesses that the choice of all the elective officers should be in the manner therein described.

The 12 mysteries. That the election of the two of each of the 12 mysteries, should be the same as in the charter of Elizabeth, except that the persons to be elected had, in that charter, the additional description of “*burgenses villæ predictæ* :”—and instead of being described merely as “*viros et homines*”—as they are in the charter of Elizabeth—they are called

Burgenses. “*burgenses*.”

The mayor, three aldermen, and eight burgesses, were to be elected, as by the charter of Elizabeth.

But instead of those 12 electing 12 other *inhabitant* burgesses, as directed by the charter of Elizabeth; the *good men* and burgesses of the 12 societies or mysteries, were to

* Rolle's Reports, 391.

meet separately, and severally nominate from each society one such man as to them shall seem fit—which 12 men shall present to the first elected 12 men, 6 out of their number, to make together 18.

James I.
1604.
The 18.

That the mayor, recorder, and aldermen, or any five or more of them, should be *justices* of the peace.

After which follows a clause, that every *free burgess*, by *birth* or *servitude*, with any free burgess of any free mystery, and no other, should be able to be admitted into the fraternity of hostmen, and be *as a brother*, if he should demand it, and should pay on his admission 53s., and not more. And every person a *free burgess*, by reason of *birth* or *servitude*, with any brother of the society of hostmen, ought to be admitted into that fraternity as a brother, if he should demand it; and every such person should pay for his admission, 33s. 4d., and not more.

Birth.
Servitude.

The charter then concludes with the usual clause for the enjoyment of all former liberties and privileges held by the burgesses, “by any incorporation, or pretence of incorporation,” with this special addition, “which are not contrary to this charter.”

Pretence
of incor-
poration.

It is clear from this clause, that *birth* and *servitude* were properly treated as *qualifications* for free burgess-ship; in the manner we have before explained in the London case—for both birth and servitude made a person of *free condition*; and if he was a *householder* within the borough, and therefore paid *scot and lot*, and was *sworn* and *enrolled*, he was a *free burgess*.

Birth.
Servitude.

It also further appears from this charter, that the free burgesses of Newcastle were a distinct class from the hostmen; and that free burgess-ship was a qualification for being the latter; as in many other places, where the different crafts and guilds were separate from the municipal government, and were altogether collateral to the municipal rights.

Hostmen.
Guilds.

There is also the following document relative to this place, of the ninth of James I. An order of council signed by 20 persons, after reciting that business of importance, concerning the general state of the corporation—especially the foun-

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 persons, after reciting that business of importance, concerning the general state of the corporation—especially the foun-

James I. dation of several hospitals, &c.—ought to be performed at
 1611. London; therefore, “the mayor, aldermen, sheriff, and rest
 Common of the common council of the town of Newcastle-upon-Tyne,
 council—*for, and in the name, stead, and place* of the mayor and
 for the *burgesses*, order, that the further handling and proceedings
 burgesses. in the same shall be in the consideration of the present
 mayor and aldermen, or the most part of them, as in their
 discretions shall be thought fit; whose act and doings therein
 they did, by that order, approve and ratify.”

In illustration of the position which is so generally important—particularly with reference to the Wycombe case,*—that the common council acted only by “*delegation*” from the *body at large*, we may instance the above document of this date, by which the mayor and common council seem themselves to admit the fact; for the mayor, aldermen, sheriff, and rest of the common council of the town of Newcastle-upon-Tyne, are described as acting “*for and in the name, stead, and place of the mayor and burgesses.*”

And certain businesses of importance, touching the general state of the corporations, especially as to the hospitals, are left in the consideration of the then mayor and aldermen, or the most part of them.†

GODMANCHESTER.

The borough of *Godmanchester* also received a charter from
 1604. James I., in the second year of his reign. It commences by
 reciting, that Godmanchester was an ancient borough, and of
 ancient demesne; that the *men* and *inhabitants* had petitioned
 for the town to be incorporated. And in consequence
 thereof, the king had granted, that it should be a free borough;
 and that the *men* and *inhabitants* of the town, and their successors,
 should be a body corporate, by the name of
 “the bailiffs, assistants and commonalty of the borough of
 “Gumcester or Godmanchester, in the county of Hunting-
 “don;” with all corporate powers.

That two of the most honest and discreet burgesses should

Men and
inhabit-
ants.

Incorporated.

* *Rex v. Westwood*, 4 B. & C. 782, 796, 818—Dom. Proc. 1830.

† See 1 Brand. App. 646.

be bailiffs; and 12 others assistants; who, with the two bailiffs, should be the common council. James I.

1604.

Common
council.

Powers are then given to the common council to make bye-laws, &c. for the governance of the officers, ministers, artificers, *inhabitants*, and *resiants* whatever within the borough. The two bailiffs and 12 assistants are then named and appointed; and for the future, the bailiffs were to be elected from the burgesses, by the bailiffs, assistants, and *commonalty*; and the assistants by the assistants, from the burgesses and *inhabitants*, as vacancies occurred.

A recorder, town clerk, fair, court of pie powder, &c. are then granted.

STAFFORD.

James I., in the third year of his reign, granted a charter to the borough of *Stafford*,* which commences by reciting, that it was an ancient and very populous place; and that the burgesses from time immemorial had enjoyed divers liberties, sometimes by the names of *burgesses* of Stafford, &c. and of late by the names of bailiffs and burgesses of the borough of Stafford; and by other names: and also by means of divers prescriptions, uses and customs. 1605.

And that variances and inconveniences in the borough had arisen, for that the principal officers, the two bailiffs, by letters patent, having equal authority for the rule and government of the borough, and the execution of their office, were so contrary in themselves, that divers controversies and factions had grown; and that other defects had arisen which might greatly hurt the public good and profit of the borough, and the good order and governance thereof: wherefore, the bailiffs, burgesses and *inhabitants* of the borough sued the king to extend to the bailiffs and burgesses his favour, and constitute and of new create the bailiffs and burgesses, and other the *inhabitants* of the borough—by what name or names before that time they were incorporated—or whether before that time they were incorporated or no—to be a new body politic and corporate, by the name of “mayor and Bailiffs.

Inhabitants

* Hargrave MSS., 288, p. 1.

James I. "burgesses of the borough of Stafford, in the county of
 1605. Stafford," for the amendment of all the defects aforesaid ;
 and with addition of such liberties and privileges as should
 be thought fit, &c. The king therefore granted, that the
 Free borough. borough of Stafford for ever thereafter should be a free
 Burgesses and in- borough of itself; and that the bailiffs, burgesses, and in-
 habitants. habitants (by what name or names they or their predecessors
 before that time were incorporated—or whether before that
 time they were incorporated or not)—and their successors
 for ever thereafter, should be a body corporate, by the name
 Incorporated. of "mayor and burgesses of the borough of Stafford, in the
 "county of Stafford."

That they should have perpetual succession; purchase,
 hold and receive lands and liberties; plead and be im-
 pleaded; have a common seal; with power to make 10
 aldermen and 10 capital burgesses, who, with the mayor,
 Common council. were to constitute the *common council*; having power to
 make laws for the government of the town.

That all fines and amerciaments should be applied to the
 use of the mayor and burgesses of the borough.

That the mayor, 10 aldermen, and 10 chief burgesses ap-
 pointed by name for life, and they only, should elect a mayor
 upon St. Luke's day, who should be chosen out of the alder-
 men.

And vacancies in the chief burgesses were to be filled by
 the mayor, aldermen, and chief burgesses, out of the most
 honest and discreet *men inhabiting* within the borough.

Men inhabiting. Strangers. That no *stranger* or *foreigner* (except he be a *freeman* and
burgess) should sell any merchandise within the borough,
 except in gross, without it be in open fairs and markets;
 neither shall use any mystery, trade, or handicraft, without
 the license of the mayor and aldermen.

Neither should *strangers* be put with the burgesses in
 assises, juries, or other inquisitions. But those which should
 arise within the borough, should be done there only by the
men of the same borough, except the matter concern the king,
 his ministers, &c.*

* In 1826, the corporation became dissolved, by the common council having

DEVIZES.

This king also, in the same year, granted a charter to *Devizes*, which commences by reciting, that it was an ancient borough, and had enjoyed divers liberties, &c. from time immemorial; that the mayor and burgesses had besought him to change the time and manner of choosing the mayor, and to explain and confirm the franchises which had been granted to them. 1606.

The king, in consequence thereof, confirmed and granted all previous liberties to the mayor and burgesses, by whatever name or names of incorporation they had been given; and for the better state of the borough, and for the burgesses and *inhabitants*, granted that the mayor and common clerk, together with 36 capital burgesses, being the common council, might elect one honest and discreet man of the number of the 12 capital burgesses, who should be *mayor* of the borough; that the mayor, common clerk and 36 capital burgesses should have the selection of all officers and ministers within the borough; that "the mayor and burgesses" might hold lands, plead and be impleaded, make bye-laws, &c. for the government of the burgesses, inhabitants and artificers. Mayor.

Jurisdiction is then given over all personal and real actions arising within the borough, so that the damages and suits do not exceed 40*l*. The mayor to have the regulation of all victuals, &c. and weights.

The charter then recites, that a guild of merchants within the borough had been famous as being *inhabited* by divers artificers who made woollen cloths, whereby the poorer inhabitants within the borough got themselves a laudable and honest livelihood, who were then reduced to poverty, because certain *foreigners*, not *inhabitants* within the borough, brought to the weekly market wares and merchandises other than corn, grain, victual, cattle, wool and woollen yarn; and sold Guild.

neglected to fill up vacancies. And his majesty George IV. granted them another charter in 1827, giving them all previous privileges, but that of exemption from service on county juries.

James I. them there by retail and not in gross, to the prejudice of the
 1605. *inhabitants* of the borough; and to prevent the same for the future, the king prohibited every such *stranger, inhabitant* or *resident* without the borough, from producing any merchandises within the borough, except in gross and at fairs. The mayor, common clerk and one of the capital burgesses were to be justices of the peace; and a confirmation of all former privileges, closes the charter.

Inhabitants This grant also was clearly intended for the benefit of the *inhabitants*; and we should add, that the king also
 1610. granted by charter, in the eighth year of his reign, certain lands to the burgesses of Devizes for their use.

1624. In the 22nd year, the king also gave to the mayor and
 Leet. burgesses authority to hold courts *leet* for all the *resiants*; and confirmed the market and fairs.

This charter expressly adds to the former burgesses the *inhabitants*, and in direct terms incorporates them.

SALISBURY.

1611. James I., in the ninth year of his reign, granted a charter to *Salisbury*: reciting that it was an ancient town, and that the citizens and *inhabitants* had enjoyed various privileges, &c.; and that *they* had besought the king to *incorporate* them, which he accordingly did, and intrusted the government of the town to a mayor, recorder, 24 aldermen, two chamberlains, 48 assistants, described as "*men, inhabitants, and citizens,*" &c.

Incorporated.

Towards the conclusion of the charter, the following clause occurs:—

Whereas the citizens and *inhabitants* then *residing and dwelling*, for the better rule, &c., and for defence in keeping
 Watch and ward. *watch and ward*, and repair of gates, ways, &c. are charged with burdens; and many merchants, artificers, husbandmen, workmen, labourers, and other inhabitants, in other
Inhabitants cities, remove themselves from their places of habitation, and come there to dwell as long as they please; and when any charge is laid on the *inhabitants*, they depart without any contribution, whereby the city is reduced:—the king

grants to the mayor and commonalty, that they, in their James I.
 common council, under their common seal, might make free 1611.
citizens. Free
citizens.

HEREFORD.

Hereford received a charter from King James, in the 17th 1619.
 year of his reign, which commences with the recital, that
 the city of Hereford was from ancient times a town and city
 incorporate, and the *inhabitants* and their predecessors had Inhabitants
 enjoyed various liberties and franchises, &c., which the then
 citizens and *inhabitants* held at the fee-farm rent of 40*l.* per
 annum: that the grants and confirmations to the citizens
 and *inhabitants* were made, not by one name of incorpo-
 ration, but by various—as “bailiff and commonalty,”—
 “citizens,”—“mayor and commonalty,”—“mayor and
 citizens,”—and “mayor, aldermen, and citizens:”—and that
 the mayor, aldermen, and citizens had besought the king
 to confirm all their previous charters, with an augmentation
 of their liberties. The king therefore granted, that the city
 should be for ever *incorporate* by itself; and that the citizens
 should be a body corporate, by the name of “the mayor;
 aldermen, and citizens.” Incorpo-
rated.

The usual corporate powers are then given;—and that one
 of the citizens should be *mayor*; and six persons named are Mayor,
&c.
 to be the aldermen.

That the mayor, aldermen, and citizens should have all
 the liberties which the bailiff and commonalty of the town
 of Hereford—the men of the town of Hereford, &c. &c., by
 whatsoever other name of incorporation, or pretence of in-
 corporation had hitherto used and enjoyed.

That there should be one-and-thirty men, of the better
 and more approved citizens—of whom the mayor and alder-
 men should be seven—who should be the chief citizens and
 counsellors, and be called the common council of the city; Common
council.
 assisting the mayor and aldermen in all causes concerning
 the city.

That the common council should yearly assemble, and Mayor.
 elect one of themselves to be mayor.

James I. That the aldermen should be elected, as vacancies occurred, from and by the common council.

1619.

That vacancies in the common council should be supplied by them from the better and more honest citizens.

The chief steward, and the corporate officers, are then named and appointed.

Frankpledge.

Other clauses also occur, granting, among other privileges, a court of record, *view of frankpledge, of all the citizens and inhabitants*—the return of writs, &c., with all fees therein, &c. The mayor is to be justice of the peace in his mayoralty, and one year after. Likewise the aldermen, chief steward, and deputy steward.

Guild.

That there should be a guild of merchants, with a hanse, and all customs thereto belonging; so that none, unless in the time of markets and fairs, who are not free of the guild, should merchandise in the city, unless at the will of the common council.

Scot and lot.

That all men *dwelling and residing* within the city, &c. should be at *scot and lot* with the citizens, and be partakers with them, in all manner of aids, talliages, and taxations whatsoever. That no *inhabitant* there should maintain any liberties or franchises within the city, suburbs, and liberties unless he were a *citizen* in the *guild* of merchants there, continually *residing* and *conversant* within the city, suburbs, and liberties.

That no *foreigners* should be placed with the citizens in any assises, &c.; but that those which arose in the city should be only by citizens.

That the common council should have power to admit any *inhabitants* of the *inhabitants* of the city, from time to time, to be citizens and *freemen*.

This charter was recited and confirmed by William III. in 1697, who states, that in the 34th year of King Charles II., the charter of James I. was surrendered, and a new one granted; but that the surrender was never enrolled, and in consequence of the proclamation of James II., the citizens and *inhabitants* resumed their previous charter, by which they had since been governed.

This charter was also clearly intended to include all the *James I.*
inhabitants, at least all the *householders paying scot and lot*, 1619.
and duly *enrolled* and *sworn*. And the whole would be *Inhabitant*
unintelligible, unless it was so considered. *house-*
holders.

It mentions the view of frankpledge, of all the citizens *Frank-*
and inhabitants; and no doubt all the householders must *pledge.*
have done their suit, and been sworn at that court.

All *men dwelling and residing* within the city, are ex-
pressly directed to be at *scot and lot* with the citizens: and *Scot and*
no foreigners are to be placed in assises with them. *lot.*

With reference to these clauses, it would be most unjust
to construe them so as to make the *inhabitants* liable to all
the burdens under the charter, and yet not entitled to the
privileges which were obviously intended for them all. And
as to the latter clause, the exclusion of the foreigners seems
to import the necessity of all the *inhabitants* being upon the
juries.

It is true that one passage describes the persons who *Guild.*
should enjoy the franchises as being "citizens—in the guild
"of merchants—and *continually residing*, and *conversant*
"within the city." And no doubt, generally speaking,
those qualifications were requisite (to use the language in
the London case),* "to make and continue a person a full
citizen." Excepting that from the numerous instances we
have given before, the being in the guild (which was a
separate collateral matter granted by this charter), was not
an absolute requisite to the being a burgess. But there
might be persons who were burgesses and not in the guild;
and persons in the guild who were not burgesses.

This part, therefore, of this clause, seems to be worded
more strongly than is usual in other charters, and would
appear to be contrary to the tenor of the common law, un-
less it is intended here to describe, as in the Saxon term it
would be, those who were to contribute to the scot and lot.

This charter gives to the common council the power to *Admitting*
admit any of the *inhabitants* to be citizens and freemen. *freemen.*

We have before observed, that when villainage ceased, *Villain age.*

* See before, p. 1484.

James I. this power was properly introduced into the charters. The
 1619. only question is, whether it gave the common council the power of arbitrarily excluding whom they thought fit? If it did, it placed the whole municipal power in their hands; and this clause would operate to neutralize all the other parts of the charter, which evidently intended the general benefit of the *inhabitants*. Moreover it would be inconsistent with the general law. This clause ought, therefore, properly to be construed as a recognition by the king, of the power of the *common council*, instead of the *jury* at the *court leet*, to swear and admit the *inhabitants* as freemen; but not interfering with the right of the *inhabitants* to be admitted. It however affords a proof that the king was dissatisfied with the conduct of the *burgesses* and *inhabitants* at large: and was desirous of throwing the power into the hands of the select body, whom he could more easily manage.

Jury.
Leet.

Coventry. For we find, two years afterwards, that King James
 1621. granted a charter to *Coventry*, in which he expressly gives power to the common council, to “*elect*” so many and such citizens, as may be necessary for the rule and governance of the city. But still, with reference to the ancient institutions, it provides, that all the officers should be elected upon the day of the *leet* or *frankpledge*. And the body of 31 are to be nominated; and they are, like the ancient grand jury, to nominate one person to be mayor, and two persons to be bailiffs.

It also states how the aldermen had been elected in the 10
Wards. *wards*; and 31 persons are to have the power of making
Inhabitants assessments upon all the *inhabitants*, towards the repair of the walls of the town.

So that although the king appears to have given somewhat a new character to the institutions of the city, for the purpose of giving more power to the select body, yet many of the ancient forms still continued, as will be seen by the
Charter. charter itself—which recites, “That the city of *Coventry* “was an ancient city and borough; and the *citizens* and “*burgesses* were, and yet are incorporated, or mentioned to “be incorporated, as well by prescription or custom from

"time immemorial, as by divers charters and letters patent, James I.
 "by the name of the mayor, bailiffs, and *commonalty* of the M^{ty}.
 "city or town of Coventry, and by divers and several other
 "names of incorporation; for the better certainty thereof,
 "and that one certain name of incorporation might be ob-
 "served and holden," the king granted and confirmed to
 the then mayor, bailiffs, and *commonalty* of the city or town
 of Coventry, and their successors, that they should be a
 body corporate, by the name of "the mayor, bailiffs, and Body
commonalty of the city of Coventry," with the usual corpo- corporate.
 rate powers.

The former charters are then recited and confirmed; and
 it is declared, that it should be lawful for the mayor of the
 city, and other persons, citizens of the city, then of the
 council of the city, to *elect* so many and such persons from Elect.
 the citizens of the city, as might be necessary for the rule
 and governance of it.

That the mayor, recorder, sheriffs, bailiffs, coroner, steward,
 chamberlains, wardens, and other officers, should be nomi-
 nated and elected yearly, and every year, on the day of the
leet or *view of frankpledge* to be holden in the city. And that Lect.
 it should be lawful for the mayor of the city and the persons
 of the council-house, on the day of holding the *leet* and view
 of *frankpledge*, yearly to nominate and return into the court
leet, in writing, the names of 31 persons, from and out of
 themselves, and the more ancient citizens, who have had
 and exercised the office of mayor, bailiffs, chamberlains, or
 wardens, &c. And that the same 31 persons, in that court 31 persons.
 from time to time nominated and returned, shall not only
 nominate and elect one person, then being a citizen of the
 city, from those who had exercised the office of one of the Mayor.
 bailiffs and sheriffs, to be mayor of the city—but shall no-
 minate and elect two other persons, being free citizens, to
 be bailiffs and sheriffs—and also the recorder, coroner, and
 all other officers.

It is then recited, that from time immemorial, 10 *wards* Wards.
 had existed, for the good rule of the city, citizens, and inha-
 bitants, living and residing therein. And for each of the

James I. wards one sufficient freeman of the city, who had exercised
 1621. the office of mayor or bailiff of the city, had been appointed for the better government of the *inhabitants* within the wards. And that the persons so appointed, had been called

Aldermen. aldermen. And it was granted, that for the future, within the 10 wards, there should be 10 persons, being freemen, nominated thereto, who had previously exercised the office of mayor or bailiffs, and who should be called *aldermen* of the city, for the governance of each ward.

Justices. The mayor and aldermen were to be justices of the peace ; and no other justices were to intromit.

That it should be lawful for the mayor and other citizens of the council, to associate to themselves so many other men of the citizens and freemen, who had been bailiffs, chamberlains, or wardens, amounting to the number of 31 persons.
Inhabitants in the whole, to tax and assess themselves and all the *inhabitants*, for the reparation of the walls of the town.

That the mayor and other persons of the council-house, shall elect 25 of the more discreet citizens or freemen of the city, who should be called the secondaries, or common council of the city.

Stranger. That no *stranger* or *foreigner*, not being a freeman of the city, should sell any wares or merchandises otherwise than in gross, except at fairs, without the special license of the mayor and aldermen.

TREGONY.

1620. With a view also of limiting the powers of a borough to the *select body* of eight burgesses, the king appears to have granted a charter, in the same year, to the borough of *Tregony*,* which recites, that it was an ancient borough, and that a *portreeve* or *mayor* had, time out of mind, governed the same ; and that the present portreeve or mayor, having besought that it might be *incorporated*, he, the king, ordained, that Tregony should be a free borough, consisting of a mayor and eight burgesses, who should govern the same ; and that Philip Jagoe should be first mayor, and eight other

* Rot. Cart. p. 2. n. 16.

persons named the first capital burgesses; and that they should yearly choose a mayor, on the Tuesday following Michaelmas-day—and have a recorder—and keep a court of record, on the first Monday of every month—and enjoy all their ancient privileges, &c.

James I.

1620.

BRISTOL.

This king also, in the 2nd and 27th years of his reign, inspects and confirms the charters of Elizabeth to *Bristol*.

1604.

And in the 19th year confirmed the charters of *Lyme*.

1620.

To satisfy the reader that the charters of incorporation did not materially affect the class of burgesses—the general rights of the borough—and particularly the parliamentary rights, we will, before we quit this branch, add an instance of a grant to a borough not returning members to Parliament; and where, therefore, there has been no temptation to disfigure the ancient rights by modern usurpation. Accordingly we find none of the measures resorted to either by the king or the governing body in this obscure borough, which were usually adopted with reference to those places where the rights were of greater importance, and followed by more considerable results.

AXBRIDGE.

The king, in the 21st year of his reign, granted a charter to *Axbridge*, which commences by reciting, that it was a borough, ancient and populous; that the mayor, aldermen, and burgesses had enjoyed divers liberties and franchises, &c. as well by charter as prescription, &c.

And the corporation represent, that there were divers ambiguities and omissions in the charter of Queen Elizabeth, and therefore pray the king to confirm the same, with certain amendments and additions.

The king, willing to remove all doubts, and to preserve the peace of the borough, and that justice, should be there kept, &c. grants, that it should be a free borough for ever; and that the mayor, aldermen, burgesses, and *inhabitants*, by whatsoever name heretofore incorporated, should be a

Free
borough.
Inhabitants

James I. body corporate, by the name of "the mayor, aldermen, and
Corporate. burgesses of the borough of Axbridge, in the county of Somerset;" and might be capable to hold and grant lands, &c. That one of the burgesses should be named the mayor; another the alderman; and eight other the capital burgesses; the nomination, election, and swearing of the mayor, aldermen, and capital burgesses, to be at the same days, times, places, &c., as in times past had been accustomed.

MUNICIPAL DOCUMENTS.

There are in this reign a few documents and records relative to some of the boroughs which it may be expedient here to insert. Thus, with reference to the Cinque Ports, it will be seen that they insisted, according to the principles of the common law, which we have before detailed, upon their right to *compel* persons living within the liberties to be *sworn* as *freemen*. This was in accordance with the duties and functions of the court leet. However, upon a perusal of the following document, it will be seen, that the brotherhood of the Cinque Ports engrafted upon the general common law, some of the more modern usages and customs of corporations.

1603. We find at this period, in the records of the Cinque Ports, at a brotherhood held at New Romney, several resolutions were made, which commence by reciting, that "there are, in many of the towns and members of the Cinque Ports, *men of wealth*, and of *good government*, dwelling within the same, who enjoy much benefit of their so dwelling; viz. freedom from payments of fifteenths and tenths, and from being returned to appear at assises or sessions in the county where they *inhabit*; and receive many other privileges or benefits by reason of their so *inhabiting* within the Cinque Ports, ancient towns, or members, which otherwise they could not enjoy, and yet *refuse to be freemen* of the town and port where they *dwell* and enjoy those benefits. By reason whereof divers of the towns, ports, and members are unprovided of sufficient and able men to execute such offices and services as they are by the charters and customs of the Cinque Ports, bound to do. It is, therefore,

Refuse to
be free-
men.

oath

fully agreed, that if the mayor, jurats, and *commonalty*, or the more part of them, in any of the Cinque Ports, towns, and their members (or bailiffs, jurats, and *commonalty* where no mayor is), or the most part of them, shall think any *inhabitant dwelling* amongst them, fit to be a freeman, and shall by the more voice of them choose such inhabitant to be a freeman of the town where they govern, and shall call him to their court hall, and there *in full and open court* acquaint him of their choice; and then and there require such person to take the *usual oath* of a freeman; and he shall not then and there, without further delay, take the *oath*, and become a freeman of the same place, he shall *forfeit to the use of the town and corporation*, a fine of 10*l.*, to be levied as fines in the same place are used to be.

James I.

Cinque
Ports.
1606.

Court.

Fine.

It will be observed that this document, according to the spirit of the time in which it was framed, speaks of the making freemen as a *choice*, or *election* by the governing body; and thus introduces into the Cinque Ports the objectionable innovation of arbitrary election and exclusion. It also speaks of the inhabitants as being *called* to be freemen—a term totally unknown to the common law, or to the usages and customs of the Cinque Ports:—but it is the expression upon which the modern term of “advocants,” in use in the Cinque Ports, was founded; and which in truth is synonymous with the more common appellation in other boroughs of “honorary freemen;” allowing of non-residence, and all the other mischiefs which attend the unlimited right of admission, assumed in later times by the corporations:—notwithstanding all the early documents of the Cinque Ports are directly prohibitory of any persons enjoying their privileges, unless they are *dwelling and resident* within the liberties.

Election.

Advocants.

The admission to the freedom is, however, by these resolutions—in conformity with the ancient usages, and the practice of the court leet—directed to be “in the full open court”—and the *inhabitants* who are admitted are directed to take the oath, which must be the *oath of allegiance, to be taken by every resident in the court leet*:—for there is no legal power or

Open
court.

Oath.

James I. authority to administer to any person an oath merely as a
 Cinque corporator; nor indeed any, but by the common law at the
 Ports. leet; and, therefore, it is found as a matter of fact, that the
 1603. Oath. oath administered in all cities and boroughs to the citizens
 and burgesses, *commences with the oath of allegiance*:—al-
 though there are often many other irrelevant matters intro-
 duced in it, which; properly speaking, have no legal warrant
 —some unnecessary, because they are implied by the common
 law—as that they should pay scot and lot, and perform all
 offices to which they are appointed—and other heads of a
 similar description.

Sworn. It is true, that some charters specially require that the
 mayor, the other officers, and the freemen should be *sworn*.
 The former the crown had the power of directing by its pre-
 rogative, as they were originally the officers of the crown:—
 but it may be very questionable whether it had the power
 of ordering the administering of any oath to the freemen, but
 that of allegiance, which was required by the common law—
 or the oaths afterwards imposed by statute.

Oath. It would, at all events, seem clear, that the corporation
 itself could have no power of administering any oath, nor
 of making any alteration in it, which the general law did not
 sanction; for as Lord Coke says,* speaking of the oath
 of fealty, “*it is not to be changed for any novelty or nicety of
 invention.*”

Penalty. The resolutions then subject the *inhabitant*, who shall re-
 fuse to take the oath and become a freeman, to penalties;
 which it is certain the brotherhood could have no right to
 impose, unless it was a duty to do those acts, for which there
 is no pretence, except as a part of the functions of the *court*
 Leet. *leet under the common law*; and therefore these resolutions
 thus again afford internal evidence of the real nature of those
 proceedings, although, as observed above, they were in some
 degree mingled with the then modern doctrines of corpo-
 rations.

Common In order also to show the real nature of the general fund
 stock. or common stock of the different boroughs, it should be ob-

* Co. Lit. 92 a.

served, that the fines which are here imposed are directed to be * *for the common use of the town.*"

James I.

Cinque
Ports.

That the object of the privileges granted to the Cinque Ports, was the security and local advantage of those places, and that they were to be enjoyed, as well as the burdens borne, by the *inhabitants* there, may be collected from the following copy of the reasons which were assigned for the Cinque Ports not sending forth land services.

1st. That they are situated near the sea, in places of greatest danger for the landing of foreign enemies; and that many of them, in times past, have been by them burned, wasted, and destroyed, and therefore have need to be kept well guarded and defended.

2nd. That the* *continual residence and attendance* of their *inhabitants* for the defence of the sea coast, and of the said town, ports, and members, is the main ground of the many and great liberties and exemptions which they have, ever since the Conquest and before, above other parts and ports of this kingdom; which have also been confirmed to them by more than 20 several acts of Parliament, and also by his majesty's late charter.

Residence.

3rd. And upon that ground it is, that "breve domini regis *non currit infra quinque portus,*"—and that they are *not to be impleaded* but *at home* within the ports, &c.; that they are not to be called out of the ports to serve in *juries*, or to do other services in the king's court at Westminster, or before the judges of assise or of gaol delivery in the county, &c.; nor before any other of his majesty's commissioners, &c. And for that ground also, the Cinque Ports have ever enjoyed this exemption, to be free from levying land soldiers. For if their *inhabitants* should be drawn out to serve his majesty elsewhere, they might be left as a prey to foreign enemies, who might be encouraged there to land, upon hope to find little or no resistance.

Juries.

Inhabitants

4th. That upon consideration of that danger, his majesty, in the second year of his reign, set forth his proclamation that the *inhabitants* of the port and sea town should keep

* See Domesday, Dover.

James I. their *continual residence* there, for the better defence and safety of those parts, and the whole kingdom, &c.

Cinque
Ports.

About the same time a letter was sent from the lords of the council to the then lord warden, *to command such persons as were then gone out of the ports to return thither*, for the safeguard and defence of the towns. Whereby it appeared, and so it seemed to the state and council, that the strength of the ports and members for their defence did consist in the bodies of the persons there *inhabiting*; which, if they should be drawn out, would be a great weakening to the *inhabitants*, and discouragement to others there to *dwell*.

Inhabiting.

5th. That the great armies that are at this present in the field, beyond the seas, not far off from the sea coast and the Cinque Ports, give them warning not to be secure, but to be well provided with men and arms for the defence and safety of themselves and the whole kingdom.

Watches.

6th. That for the same purpose, and preventing sudden dangers, there are nightly *watches* continually kept in most of the Cinque Ports; and they are all charged with a far greater proportion of arms than any other ports of the kingdom.

7th. That the most of the Cinque Ports, &c., by reason of their great charges at home, and sending forth 21 bailiffs yearly to Yarmouth, are become very poor, and some of them almost depopulated.

Inhabitants

8th. That the one half of the *inhabitants* of most of the ports consists of mariners and fishermen, who are commonly at sea, and of them there hath been about 200 yearly prest of late, to serve his majesty in his ships—besides many pilots thence daily taken up for his majesty's navy royal.

Strangers.

9th. That there are a great number of *strangers*—French, Dutch, Walloons, and all other nations—*inhabiting* within most of the principal Cinque Ports, who, if the strength of their towns shall be drawn away to serve his majesty elsewhere, may give advertisement thereof to foreign nations, with whom they have general trade, and continual intercourse

Freemen. by letters; being passengers that go to and fro daily, whereby great peril may ensue.*

* Boys' History of Sandwich, p. 752.

10th. *All freemen inhabiting* within the ports, towns, and members thereof, upon their admission, take *oaths* to maintain the charters, liberties, customs, and privileges thereof—and are therefore more careful therein.

James I.
Cinque
Ports.
Oath.

From this document it is clear, beyond the possibility of question, that all the *free inhabitants* of the Cinque Ports who contributed to the burdens and services due from them, were the persons entitled to the privileges. Those who were too *poor* to contribute, would not be included—because the reasons would not apply to them:—nor would *villains*—because they would not be sufficiently at their own disposal to perform the services:—nor occasional visitors, guests, or strangers, according to the common law, and as is expressly stated in this document. And the expression at the close of it, is in conformity with that which we established, by the authorities from the earliest periods, that *ALL FREEMEN inhabiting* were *bound* to take the oaths: which is also in accordance with the law of the leet, and is a most distinct description of a free burgess—that is, a “freeman,” a “liber homo,” *inhabiting* within a borough.

Poor.

Thus this document is decisive as to the Cinque Ports. And we have seen, in numerous instances, that the same privileges—for similar reasons—in substance, were granted to most other boroughs. And, therefore, this record, in effect, is equally decisive as to all boroughs—and their burgesses;—defining their class—and confirming the general law.

HYTHE.

The following entries relative to Hythe tend, in a great degree, to establish the same positions, and explain the general system.

In the seventh of James I., three persons are admitted to be free of the town, being *born* there when their fathers were freemen, and paid 15*d.* each, and were sworn.*

1609.
Birth.

In the 18th of James I. the following entry occurs:

1620.

At this assembly came Guy Hutson and Robert Hutson,†

* Book I, fol. 5 b.

† I, fol. 142 b.

James I. and did request to be made free; and because it could not
 Hythe. appear unto the house that they were *free born*, it was
 ordered and agreed, that, if the said Guy and Robert, upon
 Free born. search thereof to be made, should be found *not* to be *free
 born*, then they should pay for their freedoms to the cham-
 berlain, *to the use of the town*, 20s. a piece, to be paid at
 Midsummer and Christmas; and if they should be *found to
 be free born*, then they are to be free for 15d. And so they
 were *admitted* freemen, and were *sworn*.

In the 19th of James I. is the following entry:*

1621. "Whereas Mr. William Knight was heretofore elected and
 chosen one of the wardens of the hospital of St. Andrew and
 Bartholomew, in the parish of Saltwood,† and since *hath*
 Removed. *removed his dwelling out of this town*, whereby he con-
 veniently cannot join in the businesses of the hospital, there-
 fore this assembly do with one consent order, that the said
 Mr. Knight shall from henceforth stand and be dismissed of
 the said place of warden, &c."

If non-residence was a ground for removal from such an
 office as this, certainly it would put an end to the right to
 be a burgess, from whom personal services were required.

The following entry proves most distinctly that actual
 residence was the ground both of the obligation and the
 right.

1624. "In the 22d James I.‡ At this time, this house intending
 to make Mr. John Hales and Mr. John Knight jurats, sent for
 them, and made them acquainted that the house was pleased
 to make them *freemen* of this town. And they being there
 present, Mr. John Hales answered, that if he were chosen a
 Remove. freeman, *he would leave his dwelling here*, and remove and
 dwell elsewhere at Easter next. And the said Mr. John Knight,
 then also present, made answer, that if the town were willing
 to be rid of his company, then they might make him a freeman,
 for then, he said, he "*would also leave his dwelling there, and
 depart the town;*" adding, that "as yet he thought himself

* I, fol. 148 a.

† An adjoining parish, in which some part of the town of Hythe is situated.

‡ I, fol. 193 b.

"not fit to undergo such place as the town intended to put James I.
upon him. Hythe.

It is impossible not to infer from this entry, that every person who *dwelt* in the town was obliged to serve the offices within it to which he might be chosen ; but that if he actually *left the town, and gave up his dwelling, and went to another place*, he would then be released from that obligation.

SANDWICH.

The following entry occurs in the third year of James I. 1605.
in the books of *Sandwich*.

"By consent of the assembly in this year it is decreed, that no person whatever, *challenging* his freedom by the purchase of a free tenement, shall at any time hereafter be admitted to his freedom here, by any such purchase, except such tenement be free, and of the ordinary yearly rent of 5*l.* or upwards."*

And therefore we shall find hereafter, that the freeholders have erroneously been allowed to vote at Sandwich.

CHESTER.

As a proof that James I. continued the same interference 1606.
with corporations which Queen Elizabeth had begun, it appears that in the third year of his reign, the king addressed a letter to the mayor, aldermen and burgesses of *Chester*, requesting them to elect Hugh Mainwaring, Esq. as their recorder.

To which solicitation they replied :—"That no person was
"eligible to that office, except he was one of the 24 alder-
"men ; and that none could be chosen an alderman, except
"he were first *enfranchised*, and made a *free citizen* ; that
"Mr. Mainwaring had never come to them in person to desire
"the same, but was a mere *stranger* to them."

* This entry no doubt referred to those who came to reside at Sandwich in houses they had bought there : and who would not be entitled to be sworn and admitted as freemen, until they had resided there a year and a day—unless the houses they purchased were freehold—in which case they would be entitled to be admitted immediately, and challenge their freedom. The omission of any mention of residence in this order, has led to the misapprehension that the freeholders, merely on that title, were burgesses.

James I. The following document relative to the same place, will
 Chester. also show that the being admitted into any of the trading companies was a matter distinct from being a *freeman* or *burgess*.*

“Good Sir,—I have sent you a copy of the judge’s order. There is nothing to that which our company did conceive it to be. Good Sir, if you can conveniently, that yourself and our counsel, Mr. Downes, if he be with you at Dynias, would move the judges to explain themselves in their orders
 Freeman. that Birchley is *only* to be *but a freeman*, and *not to use*
 Trade. any *trade* except he first compound with that company which he would be free of; and that if he should break any orders, that then it shall be lawful for the mayor to fine him and imprison him as the mayor and his brethren in their discretion shall think good, &c. &c.

“Your loving friend to be commanded,

“Peter Drinkwater.”

The following writ was also sent to Chester, for restoring
 1622. Birchley, in the 19th of James I., 1622.†

“Writ to the mayor and citizens of the city of Chester, reciting that Thomas Birchley had complained that he was
 Born. a *freeman born* of the city, and in the liberties, and was admitted to the same, and quietly enjoyed them. And that he from the liberties and franchises aforesaid, without reasonable cause, had been removed, and that they had made the doors and windows of his shop in the city to be shut and locked, to his damage and grievance. It then directs that he to his former liberties and franchises should be restored, that his doors and windows should be opened, and the merchandise in his shop he should be permitted to sell without interruption.

The following is another document as to Chester, of the same date, and in the same depository.‡

“Mr. Recorder, in answer to those letters we received, we

* Harl. MSS. 2104, 348.

† Harl. MSS. 2091, 117.

‡ Harl. MSS. 2104, 358.

desire you to take our direction, and to acquaint the protho-
notary therewith. We all agree in this, that Birchley is to be
restored to his *freedom* of Chester *only*. Ye make a ques-
tion whether by the writ ye ought to be commanded to
suffer him to open his doors and windows. We are of opinion
the writ must be so, and so is my Lord Dyers, president.
For otherwise he is restored to nothing. And if when his
doors and windows be opened, he use any other trade, than
he may do by the custom and ordinances of your city, you
may take your course against him for that in a lawful man-
ner. And thus we bid you farewell, and rest

“ Your loving friends,

Ludlowe Castle,
24th January, 1622.

James Whitlocke.
Marmaduke Lloyd.

“ To our loving friend, Mr. Edward Whitby, Esq.
Recorder of the city Chester, in Chester, give
these.”

And the following is the order for his restitution, which 1623.
fully states all the circumstances.*

An assembly at the common hall of pleas for the city of
Chester, before the mayor, aldermen, sheriffs, and common
council of the same city.

“ Whereas in the time of the mayoralty of Sir Randle
Mainwarynge, knight, at an assembly holden in the Inner
Pentice upon the third of July, 7 James I., Thomas Birch-
ley was disfranchised and put from the freedom of this
city, for the several causes in an order of the said disfran-
chisement appearing. And that Birchley afterwards sued
a writ of restitution before his majesty's justices of Ches-
ter, directed unto the mayor and citizens, unto which
writ the mayor and citizens made a special return, and
amongst other matters therein contained set forth, that by
the immemorial custom of the city, no person might use
any trade or occupation within the city, or the liberties
thereof, unless such person were a *freeman* of the city, and
admitted and made *free of the company* and society of such

* Harl. MSS. 2091, 90.

James I. trade as he would use. And also that no person being so
 Chester. admitted and made free of one trade might use any other
 within the city or liberties thereof, unless such person did
 leave off his first trade, and was admitted and made *free of*
 Free of the *the society and company* of such other trade as he would
 company. use; upon which writ and return the cause was at several
 times argued before the justices, by counsel on both parts,
 at the assises held within the county of Chester, and was
 argued by the right worshipful Sir James Whitelocke,
 knight, then chief justice, and Sir Marmaduke Lloyd,
 knight, then also justice of Chester, who both of them in
 their several arguments did agree, and also adjudge, that
 both the recited customs were good, and consonant and
 agreeable with law; and that Birchley being first an em-
 broiderer within the city, could not, contrary to the custom,
 use any other trade; and thereupon, and also for some de-
 fect in the writ of restitution, they did adjudge that Birchley
 could *not be restored to any trade, but only* unto the *freedom*
of the city. And whereas afterwards a writ of restitution for
 Birchley was awarded by the said justices unto the mayor
 and citizens. It is now at this present assembly ordered,
 that Thomas Birchley shall be restored to the freedom of
 the city, according to the said judgment by the justices;
 and he is hereby restored accordingly."

POOLE.

1607. Another instance of an *erasure* in the books of a borough,
 in addition to those we have already instanced, occurs at
 Poole, in the fifth of James I.

"By an order or agreement, it was agreed, with the con-
 sent of the then recorder and mayor, and Maudley Mann,
and others burgesses, that the town clerk should be paid 40s.
 per annum out of the town revenues, for doing the town's
 business."

After the words "*and other the burgesses*," the words "*and*
inhabitants" appear to have been *originally* written, but
*afterwards struck out.**

* So Colchester, Winchester, Queenborough.

Again, in the same books, it is ordered by the mayor and James I.
 other burgesses, that all such merchants and victuallers of Poole.
 the town, who were not admitted and *sworn free burgesses*, 1613.
 should pay 2*d.* per ton for quayage, &c. &c.

LYNNE REGIS.

Two letters, one from Sir Robert Hitchin, knight, the 1613-14.
 other from Sir Henry Spelman, knight, desiring to be elected
 burgesses for the next parliament, having been sent to the
 burgesses of *Lynne*, they state, "forasmuch as the statute
 "of the first of Henry V., cap. 1, doth appoint that burgesses 1 Hen. V.
 "should be men *residing* and *free* in the borough, at the
 "time of their election;"—it is agreed to answer these letters,
 by saying that "the corporation is minded to choose ac-
 "cording to the statute."

There was also a second letter from the above to the
 same effect.

STEYNING.

The following is the copy of a letter to the Borough of 1623.
Steyning in the 20th of James I., from the Earl of Arundel,*
 which explains the irregular manner in which the statute
 was evaded:—

"After many very hearty commendations, it hath pleased Election
 his majesty to call a present parliament, to which you are to of mem-
 bers.
 send two burgesses. It were well if the old custom were
 duly observed, and every borough should elect members of
 their own body to undergo that service. But in regard,
 many towns are depopulated, and some are so impoverished,
 as would be heavy unto them to support the *charge* inci-
 dent, it hath been a usage of long continuance for most
 towns to make choice of such *foreigners* as were fit and Foreigners
 worthy of the places, and herein to have recourse and
 respect unto the tender made unto them of able men by
 their chief lords; and so my ancestors have done unto your
 predecessors. And although at the summons of the last

* Printed in a collection of Historical Anecdotes of the Howards, in 1769, p. 89.
 Vide ante, Paston Letters, pp. 911, 1108.

James I. parliament, those two worthy gentlemen, which by my di-
 Steyning. rection were nominated unto you, were by you neglected,
 and two other strangers unto you preferred in your election;
 yet being now given to understand, that it rather proceeded
 out of ignorance than neglect towards me, I have therefore
 thought good now again to recommend unto you, Mr. Philip
 Mainwaring, and Mr. William Gardiner, Esqs., whom I
 know to be every way worthy and fit for those places; and
*for whom I will undertake that they shall not require any
 parliament wages.* If therefore you shall make election of
 these, I shall take it well at your hands, and will deserve it.
 Howbeit, I neither may nor will press you further than to
 take due consideration thereof, and to proceed, as to your-
 selves shall seem convenient; only I desire and expect that
 you give me speedy notice what resolution you take in
 this behalf; and so I rest, your loving friend,

“ Arundel and Surrey.

“ Whitehall, January 9th, 1623.

“ To the constable and *inhabitants* of the town and bo-
 rough of Steyning.”

PLYMPTON EARLE.

1623.
 Bye-laws.

We find also at this period a compilation of bye-laws,
 customs, &c., confirmed by the mayor and common council
 of *Plympton Earle*, lawfully assembled for that purpose.

They commence by declaring, that “ if any free *burgess*
 should be *chosen* by the mayor, and refuse to be *sworn*, he
 was to forfeit 20*l.* for the common good and profit of the
 borough, (as before ordered in the case of the Cinque Ports.)*
 If any person *inhabiting* within the borough, and chosen
constable, should refuse to execute the office, he was to
 forfeit 5*l.*”

By the common law, the party was liable to be fined for
 such default; and such a fine was inflicted in a recent case.†

“ If any *freeman* or other person whatsoever, *inhabiting*
 within the borough, sue or implead any person inhabiting
 there, in any foreign court out of the borough, such *inhabi-*

* See before, p. 1507.

† 1 B. & C. 178—182.

tant (not being a freeman) so offending, should forfeit for such offence 3*l.* 6*s.* 8*d.*, and every *freeman* 40*s.*"

James I.
Plympton.

"If any person above the age of 18, who is a free burgeas, *born* of the liberty, should be *presented* to the borough court, and after being *warned by the bailiff to come to the court to be sworn as a freeman*, should absent himself, and not come within three months, he should utterly lose the possibility of his freedom, and afterwards ~~be~~ be admitted thereunto but as a *stranger*."

Born.
Refusal.

This provision and the following are, in spirit and substance, in accordance with the common law.

"If any *freeman* should have committed any abuse or misdemeanour, and be commanded by the mayor to go to the Guildhall, and refuse to do so, he should lose his liberty, and be disfranchised."

"All the principal, and other burgesses, commonly called the four and twenty men, should attend the mayor in their gowns, at the annual choosing of the new mayor and bailiff at the *law court* and sessions, upon pain of being fined, &c.; the *fares to be employed for the common good and profit of the borough*."

Leet.

"In all manner of debts between any *inhabitants* within the borough, under 3*s.* 4*d.*, the mayor might have cognizance, and commit the debtor to ward, until the debt be paid."

"If any *sworn freeman* should sell any tallow, &c., and the peazer take and require more, he should be *presented* at the *law court*."

Present-
ment.
Leet.

"That the *peazer* should take of every *stranger* that should use the beam, 4*d.* for weighing every 20 pounds of wool."

"That every *freeman* who should be sued, should after his summons have the liberty of three courts without attachment, but the fourth court might be *essoyned*, or in default an attachment might be awarded. And if the party be thought to be sufficient to answer the debt by the mayor, he should put in sureties upon his *essoign* as a *stranger* should do upon his arrest, and be arrested as a *stranger* upon oath made before the mayor by the *peazer* that the freeman is fugitive."

Essoign.
Stranger.

James I. A recital then occurs—that the expences for the main-
 Plympton. tenance of the liberty had wholly fallen upon the *free bur-*
gesses, to their great decay, being so few in number; and
 Public charges. that persons had introduced themselves to *dwell* and *keep*
shops, to sell wares by retail, *not being free burgesses** of or
 within the borough.

Inhabit. It was therefore ordered by the mayor and common council,
 —“ that such persons as should *inhabit* within the liberty
 should repair to the mayor and principal burgesses within
 one month after warning, and make agreement and composi-
 tion for their liberties and freedom of and in the borough,
 and to do all things as the *freemen* have been accustomed
 to do.”

Inmates. “ That there should not be any *inmate*, or more families or
 House- holders. *householders* than one, *dwelling* or *inhabiting* in any one house.”

Another recital states—that “ the mayor and common
 council were to elect eight *men* of the better and more
 sufficient *burgesses* to be aiding and assisting to the mayor;
 but that divers substantial and sufficient burgesses and *in-*
habitants had been chosen, and refused to execute the office.
 It was therefore ordained, that if any burgess, after being
 elected, should refuse to serve, he should forfeit 20*l*.”

The ordinances then direct, that *all fines should be for the*
benefit of the borough.

MALTON.

1624. In the 21st of James I., there is a petition from the
 townsmen of *Malton*,† stating, that it consisted of 300
 families, and for want of order and government therein it
 had lately fallen into decay, and was extremely impoverished
 by the confluence of poor and idle persons. They therefore
 request his majesty, by his charter, to make the town a
 corporation, for the maintenance and better government
 thereof, without which it cannot subsist.

And his majesty referred the consideration of this petition
 to the attorney-general.

* See also before, the Yarmouth Leet Rolls, pp. 755, 798.

† Harl. MSS. 1327, 11.

LEEDS.

1625.

But although the people of Malton were thus desirous of being incorporated, those of *Leeds* appear to have taken a different view of the subject; for, in the next year, the *inhabitants* of that place, "being many hundreds of people, desired a stay of the *corporation* lately procured by some of the ablest men in Leeds for their own ends, in the name of the whole town, without the consent of the greater number, and to their prejudice: and they requested a reference to Sir Thomas Wentworth and others, to examine the conveniency of the grant, and to certify his majesty thereof."* And it was referred accordingly.

Corporation.

These quotations will suffice for our extracts from the borough records of this reign. We proceed to cite some of the *cases* determined in the same period.

CASES.

The borough of *Colchester*, which has before afforded us much information, was the subject of judicial inquiry in this reign.

Notwithstanding the explicit words of the ordinances of Henry VI. and Queen Elizabeth, questions and disputes appear in this reign to have occurred at Colchester respecting the admissions and disfranchisements of burgesses, and the making the elections by the common council.

In this year, a mandamus was directed to the corporation of Colchester, to restore Northen to his *burgess-ship*; and they returned—that the *common people had used time out of mind to elect their burgesses* annually; and that Northen was elected one year, but not the second, and so his office expired. And the court said, that *if the usage had been so, they did not wish to alter it*, and could not make them elect any one. But if they had *removed him without cause* within the year, the court would then restore him.†

1615.
Mandamus.

* Harl. MSS. 1327, 9.

† 1 Rol. Rep. 535. 3 Bulst. 71, as to restraining the election to the select body.

James I. There is also another case about the same time, relative
 1615. to the election being restrained to the *select body*, in which,
Coke, C. J. and the whole court are reported to have said—
 according to the doctrine laid down by the judges, in their
 extra-judicial opinion in the “*corporation case*” upon which
 we have already observed, that “if there be a popular election
 of the mayor and aldermen in corporate towns, and it hap-
 pens to breed confusion amongst them, this may be altered
 Bye-law. by their own agreement, and by the common consent of all,
 to have their elections made by a fewer number; but not
 otherwise. But if by their charter they are to be elected by
 them all, then that is not to be altered, but by and with
 the general assent of the whole town, and so by that means
 to take away confusion.”*

These cases appear to have proceeded on the error, at
 that time prevalent, and continued even to our own times,
 Office. that *burgess-ship* was an *office*; and, at Colchester, it would
 seem that a burgess was continued only from year to year.
 If this really means the common burgess, there is no doubt
 that there must have been some erroneous impression as to
 the nature of burgess-ship; for it has been already abundantly
 shown by the laws, charters, and documents which have
 been cited, that the burgesses were not generally elected
 annually; though no doubt their names were annually pre-
 sented by the jury at the court leet, as proved by the records
 of East and West Looe. It is also clear, that it was alto-
 gether erroneous to suppose that the burgesses were elected
 Annual. annually at Colchester, as is proved by the documents that
 have been given relative to that particular place. Whether,
 therefore, any illegal usage to that effect had sprung up
 after the Colchester ordinances of the 29th Elizabeth, it
 would be difficult at present to ascertain. But upon some
 such practice the court seems to have acted, as they refer to
 Usage. the “usage,” and their unwillingness to alter it: a ground
 of decision certainly most unsupportable, as well with re-
 ference to this place as to boroughs in general; inasmuch
 as in the one case it altered, by a modern usage, the an-

cient constitution of the borough; and, on the other, it had a strong tendency to introduce into the various boroughs a variety of discordant usages, which in fact has been the real foundation of the varying and anomalous customs now prevalent in them; and of the difficulties which at present stand in the way of their removal; though their constitutions were founded upon the same origins, and in most instances on charters similar in substance.

James I.
1615.

The second case establishes, that at this time the *common council* were endeavouring to confine the right of election to themselves, excluding the *commonalty*; in which they appear to have been foiled by the decision of the court; which nevertheless seemed well disposed to recognize the authority of the extra-judicial opinion expressed in "*the case of corporations*:" although they qualified that opinion by adding, that "if by the charter the elections were to be by them all, then they could not be altered." And, inasmuch as the case submitted to the judges, stated that the charters gave the election to the whole body—this dictum is, in effect, directly opposed to the opinion expressed in that case, as we have already shown.

Common
council.

Nevertheless, the same doctrine is also published, and said to be the opinion of all the judges of England, by Jenkins,* in his Centuries, where it is laid down that "The election of magistrates by the common council of a corporation, (without the voices of all the commonalty, as some charters direct), is good where it has been so practised a *very long time*: for the law presumes that in some former age the whole commonalty assented to it, although that assent cannot be shown at present. Such election by the common council is expedient, to avoid confusion, and corporations have a power to make ordinances for their own government."

Jenkins.

The following principles are added as authorizing these positions:—

Ex diuturnitate temporis omnia præsumuntur esse solemniter acta. Consuetudo, et communis assuetudo vincit legem non scriptam, si sit specialis; et interpretatur legem scriptam, si lex sit generalis, to stand with the custom.

* Jenk. 273, Case 93.

James I. But the effect of the opinion of the judges would be to
 1615. set up usage, not immemorial, as evidence of right, where the charters are to the contrary—in truth, confirming usurpation. And as to the presumption of some former bye-law, authorizing the usage, none such could have existed, upon the plain doctrine laid down in the Colchester case above quoted from Bulstrode, because it would have been contrary to the charters.

The ground of avoiding confusion we have before observed upon. The general power of making bye-laws does not affect the question. And as to the principles which are quoted, although they properly apply to cases where the presumption may arise that all has been properly done, they cannot have any application where the law is written to the contrary, as is the case with the charters.

1612. In the case of Sutton's Hospital, in the 10th of James I.,* it
 Inhabitants was said, "that the *inhabitants* of a town, or other single
 "persons, who have not capacity to take in *succession*, but
 "only to their singular heirs, have capacity to take an incor-
 Incorporated. "poration; and after their incorporation, they have capacity
 "to take in *succession*, any lands, tenements, &c."

In a subsequent part of the same case, the essence of a
 Corporations. corporation was defined as being—first, lawful *authority* of incorporation, which might be by four means.—By the common law, as the king himself, &c.—By authority of Parliament.—By the king's charter.—And by prescription.—Secondly, *persons* to be incorporated, and that in two manners—persons natural—and bodies incorporate and political. Thirdly, *a name*, by which they are incorporated. Fourth, *a place*—for without a place no incorporation could be made. Fifth, by *words* sufficient in law, but not restrained to any certain legal or prescribed form of words.

The strange language used at this period† with respect to corporations, and to which we have before referred, may be
 1614. illustrated by the following logical reasoning, in the 12th James I., in a case of misnomer of the corporation of the shipwrights of Rederiffe, by *Manwood*, Chief Baron, who said, "that as touching corporations, they were invisible,

* 10 Coke, 10.

† Tipling v. Foxall, 2 Bulstrode, 233.

immortal, and that they had no soul, and therefore no sub-
 pœna lieth against them, because they have no conscience
 nor soul. A corporation is a body aggregate; none can
 create souls but God; but the king creates them, and there-
 fore they have no souls—they cannot speak nor appear in
 person, but by attorney.”

James I.

1614.

However, more sound principles of law appear to have been
 adopted in other cases; for in the 10th of James I.,* in another
 case of misnomer, respecting the mayor and burgesses of
Lynne, where the corporation had omitted the words “Burgi
 regis,”† the question for the consideration of the court was,
 whether it was a material variance. It was urged, that from
 the omission of the word “*Burgi*,” which is the *place* of in-
 corporation, the deed was avoided. For although it proves
 it was a town, it does not thereby appear it was a borough;
 for every borough is a town, but every town is not a bo-
 rough; and therefore Litt. lib. 2, cap. 10, of Burgage, says—
 “That the ancient towns, called boroughs, are the most
 “ancient towns that are in England; for those towns which
 “are now *cities* or *counties* in ancient times, were *boroughs*,
 “and called ‘boroughs,’ and from such ancient towns called
 “‘boroughs,’ came the burgesses to Parliament, when the
 “king summoned his parliament.” “And also for the
 greater part, such boroughs have divers *customs* and *usages*,
 which other towns have not, &c.” By which there appears
 a manifest difference in judgment and law betwixt a bo-
 rough and a town; and the opinion of Cavendish,‡ chief
 justice, was cited, where he holds “that all the ancient
 boroughs are of record in the exchequer.” It was contended
 by the opposite side, “that the grants, &c. of a corporation, &c.
 need not be *idem syllabis et verbis*; but it is sufficient if it
 be *idem re et sensu*.” And that the burgesses of Lynn Regis
 implied that Lynn Regis is a borough; for “burgus et bur-
 genses sunt conjugata;” and *if the words are of one effect,*
the court would enforce the matter, though there might be some
seeming difference.” It was also said in this case, that

1612.
Lynne.Burgi
regis.

Boroughs.

* 10 Co. 123. † See before, p. 1130, Charter of Incorporation, 27 Hen. VIII. 1524.

‡ 40 Ass. p. 27.

James I. "till this generation of late years, it was never read in any
 1612. "of our books that any body politic or corporate, endeavored or attempted by any suit to avoid any of their
 "leases, grants, conveyances, or other of their own deeds,
 "nor any other grants, &c. made to them, for the misnomer
 Misnomers "of their true name of incorporation. But after a window
 "was opened to give them light to avoid their own grants
 "for the misnomer of themselves; what suits and troubles
 "(to avoid grants, &c. as well made to them, as by them)
 "have followed thereupon, every one knows." And at the
 termination of the report, a difference was taken betwixt
 ancient corporations, and corporations made of late times;
 for ancient corporations made by *usage*, have divers and
 several names: and leases, grants, &c., by any of those names
 would be good. The judgment in this case was, that "*the
 misnomer was not material.*"

This was, no doubt, a correct decision; and the general
 principles stated in the case were well founded. But still
 too much reliance seems to have been placed on the passage
 Littleton. quoted from Littleton, which, though sufficiently correct
 for the purpose of his invaluable treatise, yet is not to be
 taken as affording the most satisfactory historical account
 of boroughs; as the subsequent development of ancient records
 and returns has abundantly proved.

Customs. So, also, although the *customs* of boroughs may be
 Usage. properly supported, their *usages* ought not to be so, unless
 they were immemorial; nor should be resorted to, except for
 the purpose of evidence to raise the *primâ facie* presumption
 of right.

Neither does there seem at present to be any ground for
 saying, that "all the ancient boroughs are of record in the
 exchequer:" still less can there, properly speaking, be any
 Corporations. authority for speaking of "*corporations made by usage*:" for
 it would be a palpable usurpation, and against the prerogative
 of the king, who alone has the power of making corporations.

Derby. Again, in a case relative to the town of *Derby*, it was expressly
 1614. laid down, "*that every borough is a town, but not è
 converso*"—but when the word "*burgesses*" is used, it

proves the place to be a *borough*—for they could not be bur- James I.
gesses without.* And it might be added, that a *burgess* is 1614.
properly “*the inhabitant of a borough.*”

As illustrative of the doctrine in this reign respecting bye- Bye-laws.
laws, it may be desirable to insert the following case of the 1609.
7th of James I.

The corporation of butchers, in London,† was confirmed in the third year of James I., and authority was given them to make *bye-laws*,‡ by virtue of which they afterwards *ordained*, that “no butcher, or person being a *stranger*, should “sell any veal within the city of London, unless dressed in a “particular manner; and that if they did otherwise, they “were to forfeit for every time six-pence, and if refused to “be paid, then they were to forfeit the meat.” The servant of the plaintiff not performing the ordinance, the defend- ant, upon behalf of the corporation, seized his meat for his refusal to pay the forfeiture; and for this the plaintiff brought his action of trespass, and demanded the judgment of the court. The defendant pleaded in bar, that he took the same as forfeited by their ordinance: but did not shew the ordi- nance in certain.

Harris for the defendant—The pleading is good without Certainty. showing the ordinance in certain, being by way of bar—and certainty to a common intent, by way of bar, is good.

Stephens to the contrary—The ordinance ought to be shown specially in pleading; for that the same lieth properly in their own knowledge. Also this *ordinancé* is not of any force to bind *foreigners*. Neither can they distrain by virtue Foreigners. of this, because they themselves are parties, and the other had no notice of it.

Williams, justice.—Of a private ordinance made by the butchers in their corporation, a *stranger* is not bound to take notice. Otherwise it is of an act of Parliament.

In this *Yelverton*, justice, and the court agreed—as, also,

* 2 Rol. Rep. p. 118.

† 1 Bul. 11.

‡ See *Hutton*, 14th James I., where in the *Newbury* case it was held, that a bye-law made by the weavers, that none but apprentices for seven years should exercise the trade, was unreasonable.

James I. that this bye-law was not good to bind *strangers*. But the
 1609. same had been good, if made to suppress fraud or any other
 Strangers. general inconvenience, used by a foreigner—as *corruption or the like, in the sale of their meat*; and then they ought to take notice of the same, but not here as this case is—and so judgment was given for the plaintiff.

1614. Another case also occurs in the 12th year of James I., re-
 Bye-law. lative to a *bye-law* made by the masters, guardians, and commonalty of tailors and clothworkers of *Ipswich*; upon which they brought an action of debt for a penalty incurred under its provision, that “no person exercising any of the said
 “trades within the town of Ipswich, should keep any shop
 “or chamber, or exercise the said faculties or any of them,
 “or take an apprentice or journeyman till he had presented
 “himself to the master and wardens, for the time being,
 “or some three of them; and should prove that he had
 “served seven years at the least as an apprentice; or
 “before he should be admitted by them to be a sufficient
 “workman; and if any should offend in any part thereof,
 Penalty. “that he should forfeit and pay to the masters, wardens,
 “and society, for every such offence five marks to be levied
 “by way of distress, or by action of debt, &c.”

And it was resolved,—1st, that “at the common law no
 “man could be prohibited from working in any lawful
 Trade. “trade.” 2nd, that “the restraint upon the defendant, be-
 “yond the statute of Elizabeth, was against law; for such
 “restraints are against the liberty and freedom of the subject,
 “and are the means of extortion in drawing money from
 “them, either by delay or some other subtle device, or of
 “oppression of young tradesmen by the old and rich of the
 “same trade, not permitting them to work in their trade
 “freely; and all this is against the common law and the
 “common wealth. But ordinances for the good order and
 “government of men of trades and mysteries are good—but
 “not to restrain any one in his lawful mystery.”*

There are also two important cases at this period—on the
 Disfranchisement. subjects of *disfranchisement, removal, and restitution*.

The first is that of *Bagg*, of *Plymouth*, in the 13th of James I. James I.
and had been *disfranchised* by an order signed by the mayor 1615.
and nine of the masters, for having used contumelious language towards the mayor, &c. ; but at the end of the return it is alleged, he was removed by the mayor and *commonalty*.* Bagg's case.

It was resolved, that the cause of disfranchisement Cause.
ought to be grounded upon an act against the duty of a citizen or burgess, and to the prejudice of the public good of the city or borough whereof he is a citizen or burgess, and against his oath which he took when he was sworn a freeman. For although one shall not be charged in any judicial court for the breach of a general oath, which he Oath.
took when he became officer, minister, citizen, burgess, &c. —yet if the act which he doth, be against the duty and trust of his freedom, and to the prejudice of the city or borough, and also against his oath, it enforces much the cause of his removal. And there is a condition in law tacitly annexed to his freedom ; which if he breaks, he may Freedom.
be disfranchised. But words of contempt, or contra bonos mores, although they be against the chief officer or his brethren, are good causes to punish him ;—as to commit till he has found good sureties of his good behaviour : but not to disfranchise him. So if he intends, or endeavours of himself, or conspires with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the public good of the city or borough, but he doth not execute it, it is a good cause to punish him : but not to disfranchise him. For “ non officit conatus, nisi sequatur effectus ;” and “ non officit affectus, nisi sequatur effectus.” And the reason and cause thereof is, that when a man is a freeman of a city or borough, he has a freehold in his freedom† for life ;—and with others, in their politic capacity, has an inheritance in the lands of the corporation, and interest in their goods. And perhaps it concerns his trade and means

* 11 Co. 93.

† This appears to be a new doctrine introduced at this time—as being free was no office, but only a state or condition in society. It is absurd to say, that a freeman had a freehold in his freedom.

James I. of living,* and his credit and estimation; and therefore the
 1615. matter which shall be a cause of his disfranchisement, ought
 Intention. to be an act or deed; and not an intention or an endeavour,
 which he may repent of before the execution—and from
 whence no prejudice ensues. And they who have offices of
 trust and confidence shall not forfeit them by endeavours and
 intentions to do acts, although they declare them by express
 words, unless the act itself shall ensue. And if a contempt
 (be it of omission or commission) should be a good cause to
 disfranchise, the best citizen or burgess might be, at one
 time or other, disfranchised; which would be great *cause of*
faction and contention in cities and boroughs.

As to the second it was resolved, that no freeman of any
 corporation can be disfranchised by them,† unless they have
 Charter. authority to do so by the express words of the charter, or by
 Prescription. But if they have not authority, neither by
 Charter. prescription, then he ought to be convicted by
 Prescription. course of law before he can be removed, as appears by Magna
 Charta, chap. 29. And if the corporation have power, by
 charter or prescription, to remove him for a reasonable
 For cause. cause, that will be per legem terræ. But if they have no
 such power, he ought to be convicted per judicium parium
 suorum, &c.—as if a citizen or freeman be attainted of for-
 gery, perjury, or conspiracy, at the king's suit, &c.; or
 of any other crime whereby he is become infamous—upon
 such attainder they may remove him. So if he be convicted
 of any such offence, which is against the duty and trust of
 his freedom, and to the public prejudice of the city or bo-
 rough whereof he is free, and against his oath—as if he has
 burnt or defaced the charters or evidences of the city or bo-
 rough; or razed or corrupted them; and is thereof con-
 victed and attainted—these and the like are good causes to
 remove him. And although they have lawful authority, ei-
 ther by charter or prescription, to remove any one from the
 freedom—and that they have just cause to remove him; yet

* See before, where the incongruity of a person being liable to be fined for trad-
 ing, not being free, and yet not entitled to be made free, is pointed out—if that is
 law, the consequence here stated would, in all probability, follow.

† But see the judgment in *R. v. Richardson*, 1 Bur. 539, contra.

it appears by the return that they have proceeded against him without hearing him answer to what was objected; or that he was not reasonably warned; such removal is void, and shall not bind the party, “*quia quicumque aliquid statuerit parte inauditâ alterâ, æquum licet statuerit, haud æquus fuerit;*” and such removal is against justice and right.

James I.

1615.

Not summoned.

As to the third question — if they have power by charter or prescription to disfranchise, and afterwards the judges of the King’s Bench award a writ to them to restore the party, or signify the cause, &c., and they certify a sufficient cause to remove him, but it is false—then the court cannot award a writ to restore him; neither can any issue be taken thereupon*—because the parties are strangers, and have no day in court: but the party grieved may well have an action upon the special matter, against those who made the certificate, and aver it to be false; and if it is found for him, and he obtains judgment against them, so that it may appear to the justices that the causes of the return are false, then they shall award a writ of restitution.

Mandamus.

Restitution.

Also, if the party grieved, who is so disfranchised, is, for the causes of his disfranchisement, committed to prison, or if his shop is shut up, or if with force he is removed out of their assembly, &c., in these, and the like cases, he may have an action of false imprisonment, or an action of trespass, *quare domum fregit*; or of assault and battery. And in those actions, the *causes* of his disfranchisement ought to be pleaded, and decided according to law.

Causes.

Also it was resolved, that such return of disfranchisement ought to be certain—so that sufficient matter may appear to the court to disfranchise the party, and *eo potius*; because the party cannot have answer to it, as is aforesaid.

Lastly, it was resolved, that for none of the causes contained in the certificate, Bagg, by law, ought to have been removed; and therefore, by the whole court, a writ was awarded to *restore* him to his franchise and freedom.

Restore.

The reporter adds a note to the reader, that in the argu-

* But see now the stat. 9 Anne, ch. 20.

- James I. ment of this case, much was said to exhort citizens and
 1615. burgesses to yield obedience and reverence to the chief magistrates in their cities and boroughs; because they derive their authority from the king, and “obedientia est legis essentia.” And therefore it appears before, how they shall be punished who commit any contempt against them: but the principal question of this case was, what acts were sufficient causes in law, for the disfranchisement of any citizen or burgess, &c.
1619. There is a case, in the 17th of James I.,* of a *disfranchisement*, in which a writ to restore was refused.
- Mandamus. Warren, being one of the council of Coventry, was removed, and obtained a writ of restitution. And thereupon the corporation returned, that “they had a custom to elect any to be of the common council, and to remove him ad libitum;” and that Warren was removed. And the court held that the return was good. And this difference was
- Restore. taken: that where a man is a freeman or alderman, they cannot remove him from his freedom or place without cause. And in such case a custom is void. Because the party hath a freehold therein. But to be of the council, is a thing collateral to a corporation. The council then surmised, that
- Freeman. he was also an alderman, and removed from that office:—
- Alderman. and whereupon a new writ was issued to restore him to his aldermanship.†

But the above does not appear to be the proper reason.

Office. A freeman is no office, but only a franchise. The real ground as to the aldermen, is as stated in Dighton’s case;‡—that it is a judicial office. As to a freeman—*liber homo*—or burgess—that is a duty and franchise for the purposes of police. And a person is bound to be a burgess, unless he is an out-law.

There are also, in this and the preceding reign, an important class of cases, which although they do not apply directly to the question of the condition of the *burgesses*, or to *corporations*, yet they so far affect the rights of *inhabitants*, and have a tendency to support the opinion,

* Cro. Jac. 540.

† Vide 26 Hen. VIII. 5.

‡ Vent. 77.

that inhabitants could not possess any rights unless incor- James I.
porated, that it would be improper to pass them over in
silence. We shall therefore cite them together, in the same
place, that the reader may be enabled to take a combined
view of them.

The first occurs in the 30th year of Queen Elizabeth. In 1587.
a case of replevin, the defendant avowed for damage feasant,
by the commandment of his master, the Lord Cromwell.*
The plaintiff, in the plea in bar, justified the putting in
his cattle into the land, where, &c., by reason that N. is
an ancient town—and that, from time immemorial, every
inhabitant had common for all manner of cattle, levant and Inhabitants
couchant, within it.

The defendant said, that the house in which the plaintiff
inhabited—and by reason of the residence in which, he claimed Residence.
common—was a new house, erected within 30 years; and
before that time, there had not been any house there. Upon
which the defendant demurred.—For the plaintiff it was
argued, that he should have common there, by reason of
his residence in the new house. And it was said, that the
residency is the cause, and not the land, nor the person thereof;
and the case of the 15th Edw. IV., 29, was cited. But it
was admitted, that if the lord improve part of the common,
he should not have common in the residue for the land which
was improved, because he cannot prescribe for it—as the
book is in 5 Ass. But here in this case, the plaintiff does
not prescribe in any person certain, or in, or for any new
thing; but he sets forth, that the use of the town hath always
been, that the *inhabitants* should have common there. Inhabitants

And this common is not common appendant or appurte-
nant; but common in gross.† And he said, that if the house
of a freeholder, used to have such common, fall down, and
he erected a new house in another part of the land, he should
have common for that new-erected house as he had before. House.
And he took a difference between the case of estovers, where
a new chimney is erected, and this case. And he stood
much upon the matter of the prescription.

* Costard v. Wingfield, 2 Leon. 44.

† Needham, 37 Hen. VI. 34 b.

James I.

1587.

Inhabitants

New
house.

On the contrary, for the defendant, exception was taken to the prescription, because it is alleged, that it is antiqua villa; but not said, that it hath been so time out of mind, &c., as it ought to be.* And then if it is not an ancient town time out of mind, the parties cannot prescribe, as *inhabitants* of the town, to have common. And if such a prescription as this be good in law, that every one who erected a *new house* within the town should have common to such a house, it would be prejudicial to the ancient town, and to the utter overthrow and manifest impairing of the common. And it might so happen, that one who had but little ground in the town, might erect 20 new houses, and so an infinite number might be newly erected, and there should be common allowed to every inhabitant within the new-erected houses; which would be inconvenient and unreasonable.

Anderson, chief justice.—He who erects a *new house* cannot prescribe in the common; for then a prescription might begin at this day, which cannot be: and he insisted upon the general loss which would happen to the ancient tenants, if such a prescription for new erections should be good.

Periam, if it should be law, that he should have common in this case, then all the benefit which the statute gives to the lord for improvement, would be taken away by such new edifications, &c., which were not reasonable: and such was the opinion of the other justices. Therefore they all agreed, that in the principal case, the plaintiffs should not have common for the *new-erected houses*. But the entry of the judgment was respited, until the court had seen the record; and after that they had seen and considered it *Anderson* and *Periam* were of opinion as before. *Windham* did incline to the contrary. But they all agreed that he who set up again a new chimney where the old one was before, should have *estovers* to the new chimney. And so if he builds a new house upon the foundation of an old house, that he should have common to his said house newly erected. So if a house falleth down, and the *resiant* or

* See 15 Edw. IV. 29 a.

inhabitant sets up a new house in the same place. And also if a man hath a mill, and a watercourse to it time out of mind, and which he hath used to cleanse—if the mill falleth, and he erecteth a new house, he shall have the watercourse, and liberty to cleanse it, as he had before. And afterwards, the same term, judgment was given for the defendant, to which Windham, justice, had assented. James I.
1587.

This case is evidently decided upon the ground that the *inhabitants*, as such, could not enjoy a right of common. Inhabitants But what foundation there is in reason for such a position, it would be difficult to explain.

If a lord of a town should for his own benefit, as well with a view to the advantage of the town, grant that the inhabitants of it (they always being considered with reference to the general law to be confined to *inhabitant householders*), should have a right of feeding their cattle over the lands which he gave for the purpose, what reason is there that the *inhabitant householders* should not enjoy that right:—as well those living in houses there at the time, as the inhabitants of new houses, the building of which might be assumed to be a benefit as well to the lord as to the town itself? Common.

No satisfactory authority appears to have been cited for the contrary position; and there seems to have been much good reason for the assertion of the counsel for the plaintiff, that “the *right of common was, by reason of the residence and* Residence. *inhabiting in the town.*”

This, therefore, can hardly be considered a decisive authority upon the point, particularly as the judges appear to have doubted, and to have suspended their judgment for some time. It seems clearly to have been new law, and its soundness may be questioned; at all events, it proceeds on a technical distinction, which cannot be felt or understood by the great mass of the people; as in opposition to the common sense of the thing; as well as placing an embarrassment in the way of an arrangement so beneficial to a town, as that the *inhabitants* should have such a right; and which, in fact, has been, in defiance of all these decisions, exercised, Practice.

James I. and still continues to be exercised, in many parts of the
 1587. kingdom, which is a most unseemly position for the law to be placed in, as opposed to the general practice.

The next case is in the same year.* In a replevin, the defendant avowed for damage feasants. The plaintiff pleaded
 Inhabitant. in bar—"That every *inhabitant* in every *messuage* in the town had used to have common. It was stated that the prescription was not good, for want of capacity in the party who pretended interest; for it is not certain, but applied to a multitude. If the king grants a rent *probis hominibus* of Islington, the same is void; for they are not capable. It was answered, the prescription was good; for although it was granted that a confused multitude cannot prescribe in a matter of *interest*, but only in an *easement* or discharge—as in a way to the church—and that by reason of *custom* in the land, and not in the persons; yet in 7 E. IV. 26. it is pleaded that all the *inhabitants* within such a town time out of mind, &c. have used to have *common* there, &c. And a prescription for a township to have a way to the church, was held good by Danby. Littleton saying it ought to be pleaded by way of *usage*. And in the 18th of Edward IV. 3, it is said—all the *inhabitants* of a *town* may well prescribe. And Bracton, 222, 223, was cited:—*Communia quando-cunque ex longo usu sive constitutione cum pacifica possessione continua et non, intermixta ex scientia, negligentia, et patientia Dominorum ita etiam amitti potest per negligentiam et non usum*. And he vouched Britton, fol. 144. "Common" is obtained by long sufferance, and also it may be lost by "long negligence, &c."

Observations. Here the prescription is expressly and properly laid to be in the *inhabitant* of every *messuage* in the town, which is the same as every *inhabitant householder*, who, as he would sustain the burthen—pay the scot, and bear the lot of the town—so might he reasonably enjoy the privileges of it. And there seems no sound reason why, amongst others, he should not enjoy the privilege of putting his cattle upon lands given for that purpose by the lord of the town.

* 3 Leon. 202.

But it was said, that the *inhabitants* had not the capacity to take such a benefit; and that a grant of a rent “*probis hominibus* of Islington,” was void. A strange position, for which there is no support, except that it has been asserted and assented to. James I.
1587.
Inhabitants

We have seen many indisputable instances of *inhabitants* having *actually received and enjoyed such*, and many other, privileges. Innumerable precedents could be cited, of grants to the *good men* of towns and places in all parts of the present empire; and it is making an assertion without reason or authority, and against practice, to lay down such a doctrine. In fact, there are earlier authorities quoted to the contrary.*

The next case is six years afterwards, in the 36th year of Queen Elizabeth.† 1593.

In replevin, the defendant made conusance as bailiff of Sir Thomas Hatton; the place where the cattle had been taken being parcel of the manor of Benfield.

The plaintiff pleaded in bar, that the *vill* of Benfield was an *ancient vill*, and that within it there had been a custom from time immemorial, that every *inhabitant* in any ancient messuage should have common in the waste for all his beasts levant and couchant within the vill, and that he was an *inhabitant*, &c. *Inhabitant.*

Issue was joined upon this prescription, and found for the plaintiff.

It was moved in arrest of judgment, that it was a void and therefore an ill prescription, for *every inhabitant* to prescribe, &c. And therefore the bar was ill. *Yelverton* moved for the plaintiff, to have judgment; for it is pleaded by way of *custom* and *usage*, and it is not a prescription, which may be well enough; for *common might be as well by reason of inhabitancy, as otherwise*. And *common may well be appended to a house*.‡ It is said, there is not any difference betwixt House.

* And see in the case of the College of Physicians v. Salmon, Holt's Rep. 171; 1 Salk. 1915; Mod. 327; 10 Rep. 29.

† Cro. Eliz. 362.

‡ 22 Hen. VI. 43. 10 Hen. VI. 24. 15 Edw. IV. 32.

James I.
1593. common appendant, and common by reason of *inhabitancy*; so it is there admitted, that there may be *common in respect of inhabitancy*. It hath been objected, that *inhabitants* are not persons able to prescribe. But it was thereto answered, that it is not here alleged to be in the person, but to be the usage of the village.* And though *inhabitants* cannot prescribe, yet a *custom* may be alleged, that *inhabitants* may have common.

Anderson.—It hath been adjudged lately in this court, that it is a void and an idle prescription, and there is not any colour against it; for an inhabitant cannot have common, if he hath not any *interest* or *estate* therein; and this is not shown in such a prescription, wherefore it is not good. Also, if he be ousted thereof, he hath not any remedy nor action for it, but the lord who is the owner thereof. And therefore the interest shall not be taken from the lord, and the lord and the *inhabitants* cannot both have interest therein.

Walmsley.—Such a prescription cannot begin at this day, and therefore continuance cannot make it good. For a grant of common “*inhabitantibus*” cannot be good; *because, they be not any corporation*. And by prescription it cannot be good, for it is in nature of a purchase, and an *inhabitant* cannot purchase to himself and his successor.

Beaumont.—This is not any of the four commons, viz. appendant, appurtenant, in gross, or vicinage: wherefore it is no good common.

Owen accord, for they be *not any corporation to prescribe*; but a freeholder may allege he is seised, and that he and all those whose estate he has, had right of common; and that is a good prescription.

Usage. But all the justices held, that *usage* may be alleged by reason of *inhabitancy* to have an *easement*; but not to have an *inheritance*.

Anderson.—It is the common course throughout England;

* Vide 7 Hen. VIII., 16; 11 Hen. VI., 18. Prior of Dunstable's case, 7 Edw. IV. 24; 15 Edw. IV. 29; 19 Edw. IV. 3; 20 Edw. IV. 10. Prescription. Bro. 100.

and it is *absurd* and oppositum in objecto, that the *common* should be in *the inhabitants*; for it would be mischievous to take it by a *prescription* from the owner of the soil. And it is not possible that *should be good by usage*, which *cannot have a lawful continuance*; and custom and prescription are one. But it was adjourned.

James I.

1593.

Inhabitants

This case affords an instance how one error is speedily followed by another.

The opinion of the court in the last case being against the right of the inhabitant in the newly-erected house; the pleader in this occasion prescribes for every inhabitant in an *ancient* messuage. And it will be seen subsequently, that it was in a few years after assumed to be the clear law, that such a prescription could only belong to an *ancient* house.

Ancient
house.

The objection in this case was founded upon the ground, that the *inhabitants* could not prescribe; upon which we have already observed. And that doctrine rests on the general positions, that every prescription presupposes a grant; and that a grant could not be made to the *inhabitants*. But we have shown, that such grants were made; and the *inhabitants* enjoyed and still enjoy rights and privileges under them. And Lord Coke truly asserts, that anciently such grants were made, and the inhabitants held by them. So that this position failing, there is no foundation for the *second*, which is the consequence of it; and therefore till the point was here assumed, there does not seem to be any legal warrant for the principle, as there certainly is none in reason; and the practice has been opposed to it.

Inhabitants

The counsel for the plaintiff seems not to have disputed this point, but to have acquiesced in it, and therefore, in effect, gave up the case—only attempting to support ~~his case~~ upon technical distinctions between custom, usage, and prescription; which, as to the matter in dispute, would have made no essential difference:—he however justly argued, that “common rights might be as well by reason of *inhabitan-*
tancy as otherwise;” and it would be difficult to suggest any sound argument against that position.

Inhabi-
tancy.

James I. One of the judges appears to have assumed that it had
 1593. been decided, that a "prescription for the *inhabitants* to have
 "common was void." This probably alluded to the last case,
 in which, however, the reader has seen the judges differed.

It was also added, "that there was not any colour against
 that doctrine."—We have suggested that there was no colour
 for it;—certain it is, that the usage and practice have been
 against it.

Mr. Justice *Anderson* also said, "that an inhabitant could
 not have common if he had not any estate or interest therein."
 Whether his right could, technically speaking, be called an
 interest or estate, is immaterial. That the possession of such
 a right was essential to the inhabitants—that it was the an-
 cient practice to grant it, and for it to be enjoyed—and that
 such enjoyment has continued to the present day is indis-
 putable; and therefore this technical distinction might, per-
 haps, be disregarded.

Remedy. The learned judge, however, having upon that ground
 stated that the prescription could not be supported, adopts
 rather an inverted mode of reasoning, by arguing, that there
 was no such prescription, because there was no remedy for
 it. It would have been a mode of reasoning more consistent
 with the general principles of the law to have assumed the
 principle, "that where there is a right, there is a remedy;"
 and that the inhabitants being entitled by prescription, as in
 practice they were, were entitled to a remedy which there
 would have been no difficulty whatever in finding, provided
 the inhabitants could prescribe, which was the question;
 for the inhabitant might either have had an action upon the
 case, for disturbance of his right of common: or if his cattle
 were distrained, he might have pleaded in bar his prescrip-
 tive right.

Lord. The further reasoning of the learned judge is certainly ex-
 traordinary. He states that "the lord is the owner thereof,
 and that the interest should not be taken from the lord."
 But the interest is equally taken from him, whether it is
 claimed by a corporation, or by an inhabitant. That reason,
 therefore, is of little avail.

James I.

1593.

Interest.

It is also said, that “the lord and the inhabitants could not both have an interest therein:” and yet the lord, and a person claiming in a free estate (or a corporation) have both an interest; the lord to the soil—commoners to the right of common. This argument, therefore, can likewise be of no avail.

Mr. Justice Walmsley assumed that “the prescription could not exist; because a grant of common to the inhabitants would not be good”—but that is the point we have controverted, both in law and fact. He further says, that “it is in the nature of a purchase, and an inhabitant could not purchase to him and his successors;”—which is undoubtedly true of an individual; and with respect to the particular question of a purchase to him and his successors. But it is not true, that the *inhabitants* of a town could not have a grant made to them, by way of purchase or otherwise, that they the then *inhabitants*, and all future *inhabitants*, should have a right of common, or any other right of a similar description. The fact of inhabiting in a house within the prescribed limits, would always be sufficient to denote the person who was to enjoy the right; and what is the difficulty in law or reason that a grant should be made to such persons? In truth, they were made and acted upon, notwithstanding all the technical reasoning to the contrary.

Inhabitants
of a town.

Mr. Justice Beaumont said, it was not any of the four commons, viz. appendant, appurtenant, in gross, or vicinage. What then?—Commons had not been sufficiently defined—there was a fifth right, by “*inhabitaney*;”—this therefore does not appear to warrant the conclusion that on this ground the right of common was not maintainable.

By two of the judges it was said, the inhabitants could not prescribe, for they were not incorporated.

But the history of the country* for many centuries shows, that

* As an instance of the manner in which these rights were claimed and exercised, we find among the Harleian MSS. a testimonial letter, or certificate, signed by 86 of the *inhabitants* of Dunstable, Edisburgh, Whipsnade, Tilsworth, Stanbrigg, and Kemesworth, touching the right of common of pasture claimed by the *inhabitants* of Houghton and Sewelle, in the fields of Eytone and Totenho. Various debates and strifes had arisen between the *tenants*, *inhabitants*, and *resiants* of Eytone and

James I. *the inhabitants could have such a grant made to them, and*
 1593. *therefore they could prescribe.*

Afterwards the still more technical objection was taken, that "*usage* might be alleged by reason of inhabitaney to
 Easement. "have an *easement*, but not an *inheritance*:"—a distinction
 Inherit- which must be left to the fostering care of the lawyers.
 ance.

Another learned judge roundly asserted, that it was the common course throughout England. The contrary is the fact. He added, "it was absurd, and oppositum in objecto, "that the commons should be in the *inhabitants*"—which is the assumption of the whole question in dispute. He also adds, "it would be mischievous to take it by a prescription "from the owner of the soil." It would be equally so to take it by a prescription in a *que* estate or by a corporation.

In conclusion, it is said, "It was not possible that should
 Usage. "be good by *usage* which could not have a lawful continu-
 "ance." A principle, no doubt, most correct—fit always to be kept in recollection—and particularly applicable to the subject of our present inquiry; but inapplicable to the case in which it was cited: for there the right could have had a lawful beginning and continuance—and, in truth, always has continued.

The next case which occurs on this subject, is in the
 1606. fourth year of James I., and is the well known case of
 Gateward's trespass, *Smith* against *Gateward*, for breaking and entering
 case. a close at Horsington, in the county of Lincoln, and depas-
 turing the same with cattle.† The defendant justified, by pleading that the town of Stixwold is an *ancient* town, contiguous to the close in question; and that, from time immemorial, there has been a custom within that town, that the *inhabitants* within any *ancient messuage*, by reason of

Totenho, on the one part, and the *tenants, inhabitants, and residents* of Houghton and Sewelle, on the other part, for certain common of pasture which the *tenants inhabitants, and residents* of Houghton and Sewelle ask and claim to have therein for their beasts and cattle, in divers places and fields of the *tenants, inhabitants, and residents* of Eytone and Totenho.—Liber Irrotulatorius seu Regestrum cartarum Prioratus de Dunstaple.—Harl. MSS., 1886, 126 b. Similar grants were made to and enjoyed by the inhabitants of Southampton, Calne, and other places.

* 4 Co. 60, & Cro. Jac. 152.

their *commorancy* and *residence*, have ever been accustomed to have pasture for their cattle in the close in question. And that he, the defendant, was *commorant* and *inhabitant* in an *ancient house* in the town.

James I.

1606.

Gateward's
case.

This plea began Trin. 3 Jac. I., and was oftentimes* argued at the bar. And this term, was openly argued at the bench by all the justices.

And it was unanimously resolved, by all the judges of the Common Pleas, that the custom was against law, for several reasons.—1st. There are but four manner of commons—*sic*. common appendant—appurtenant—in gross—and by reason of vicinage. And this common by reason of *commorancy* and *residence* is none of them, and “argumen-
“tum a divisione est fortissimum in jure.”—2nd. What estate shall he have who is *inhabitant* in the common, when it appears he hath no estate interest in the house, but a mere habitation and dwelling, in respect of which, he ought to have his common? For none can have interest in common, in respect of a house, in which he hath no interest.—3rd. Such common will be transitory, and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy; and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance.—4thly. It will be against the nature and quality of a common; for every common may be suspended or extinguished; but such a common will be so incident to the person, that no person certain can extinguish it, but as soon as he who releases, &c. removes, the new inhabitant shall have it.—5thly. If the law should allow such common, the law would give an action or remedy for it; but he who claims it as an *inhabitant*, can have no action for it.—6thly. In these words, “*inhabitants and residents*,” are included tenant in fee-simple, tenant for life, for years, tenant by elegit, &c., tenant-at-will, &c., and he who hath no interest, but only his *habitation* and *dwelling*; and by the rule of all our books, without question, tenant in fee-simple ought to prescribe in

* See Cro. Jac. 152.

James I. his own name ; tenant for life, years, by elegit, &c., and at
 1606. will, &c., in the name of him who hath the fee. And as he
 Gateward's case. who hath no interest, can have no common ; so none that
 Interest. hath interest, if it be but at will, who ought to have com-
 mon, but by good pleading may enjoy it.—7thly. No im-
 Improve- provement can be made in any wastes, if such common
 ment. should be allowed ; for the tenants for life, for years, at will,
 tenant by elegit, statute staple, and statute merchant, of
 houses of the lord, would have common in the wastes
 of the lord himself, if such prescription should be al-
 lowed, which would be inconvenient. But two differences
 were taken and agreed by the whole court.—1st. Between
 a charge in the soil of another, and a discharge in his own
 soil.—2nd. Between an interest or profit, to be taken or had
 in another's soil, and an easement in another's soil ; and
 therefore a custom that *every inhabitant* of a town hath paid
 a modus decimandi to the parson, in discharge of their tithes
 is good ; for they claim not a charge, or profit apprender, in
 the soil of another, but a discharge in their own land. So
 of a custom that *every inhabitant* of such a town shall
 have a way over such land, either to the church or market,
 &c., that is good ; for it is but an easement, and no profit.
 And a way or passage may well follow the person, and no
 such inconvenience, as in the case at bar.—8th. It was re-
 Copyhold- solved, that *copyholders* in fee or for life, may, by custom of
 ers. the manor, have common in the demans of the lord, but
 then, they ought to allege the custom of the manor to be
 “quod quilibet tenens customarius cujuslibet antiqui mes-
 suagii customar, &c.,” and not “quod quilibet inhabitans
 “infra aliquod antiquum messuagium customar, &c.” For
 a *copyholder* hath a customary interest in the house, &c.,
 and therefore he may have a customary common in the lord's
 wastes. And in such case he cannot prescribe in the name
 of the lord ; for the lord cannot claim common in his own
 soil ; and therefore, of necessity, such custom ought to be
 alleged. Vide 21 Edward III., 34. See the fourth Coke's
 Reports, Foiston's Case, 31, 32.

Another difference was taken and agreed, between a *pre-*

scription, which always is alleged in the person, and a custom, which always ought to be alleged in the land; for every prescription ought to have, by common intendment, a lawful beginning; but otherwise it is of a custom, for that ought to be reasonable. And *ex certâ causâ rationabili* (as Littleton saith) *usitata*; but need not to be intended to have a lawful beginning; as custom to have land devisable, or of the nature of a gavelkind, or borough-English, &c.

James I.
1606.
Gateward's
case.
Prescrip-
tion.
Custom.

These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning, by grant, or act, or agreement, but only by Parliament. See also, for this matter, Foiston's case.

But a custom that an *inhabitant* or *resident* shall grant or take any profit, is merely void.

9thly. It was resolved, that if the custom had been alleged that "*quilibet pater familias infra aliquod antiquum messuag, &c.*," it would be also insufficient, for the causes and reasons aforesaid. And if he hath any interest, he may be relieved as aforesaid. Vide 7 Edward IV. 26 a; 15 Edward IV. 29 b, and 32; 18 Edward IV. 3 b; 20 Edward IV. 10 b; 18 Henry VIII. 1 b; 19 Hen. VIII., reported by Spelman, that such custom is not warranted by law. And so it was adjudged in this court, Trin. 33 Elizabeth, Rot. 4, 22. See the Book of Entries, Trespass, Common, 6; Vide 9 Henry VI. 62 b.; 7 Edward VI.; Dyer, 70, Isam's case.

Note, reader, the law in this general case, well resolved. And no book in the law is adjudged against it. And hereby it appears how pleaders may safely plead, in these and the like cases; and observe well, that the *custom* in the case at bar, was insufficient and repugnant in itself. For it was alleged that the custom of the town of S—— was, that *every inhabitant* thereof, had used, &c., to have common within a place in the town of H——, which was another town. Vide 21 Elizabeth; Dyer, 363, pl. 27.

It will have been seen that this case, like the last, proceeds upon the assumption, that the *house*, in respect of which an inhabitant claimed his right, must be an *ancient*

James I. messuage, as it is so pleaded; and therefore it is not so
 1606. surprising as it otherwise would be, that all the judges
 Gateward's decided against the right.
 case.

The reasons, however, of the judgment, do not appear to be very satisfactory.

The first is one upon which we have already observed in the last case, viz., that the right of common by reason of
 Commorancy. *commorancy* or *residence*, was neither common appendant, appurtenant, in gross, or in vicinage, for which the principle is quoted, that “argumentum a divisione est fortissimum in jure,” the weight of which the reader will be enabled to appreciate.

Estate. The second disputed the estate which the inhabitant had in the common, upon which we have also previously commented. And it is added, that none could have an interest in common, in respect of a house in which he hath no interest, which is little more than a jingle of words, unless it means that the occupier was a mere tenant-at-will, which at any time, was very rare, and in modern times, has been held to enure as a tenancy from year to year; and therefore, this argument at the present moment, could have no weight at all.

Uncertain. Thirdly, it was said that the right would be transitory and uncertain; but it would not be—excepting only in a slight degree, more transitory than the right of every commoner who prescribed in a que estate, or of every corporator; and as for certainty, nothing could be more certain than that it was to be enjoyed by the *inhabitant householder*, who could in the readiest manner be denoted, whilst, on the contrary, nothing could be more uncertain than the right of the corporator, who, according to the modern doctrine, might be an inmate—a lodger—a new inhabitant—or even a non-resident.

Extinction. The fourth reason was, “that every common might be
 extinguishment. “suspended or extinguished, but that this right would be “so incident to the person, that no one could extinguish it.” Nor was it ever intended to be extinguished, because it was meant to be for the permanent benefit of the inhabitants of the place.

The fifth reason is as to the remedy, upon which we have before remarked. James I.
1606.

The sixth was, that in the words "*inhabitants and residents*," are included tenants in fee simple—for life—years—by elegit—and at will—upon which are founded some purely technical objections, which are totally immaterial to the real question in dispute: and the argument concludes with assuming that the inhabitants have no interest, which we have already answered. Gateward's case.
Remedy.
Inhabitants

The seventh adverts to an inconvenience which it is said would arise, in the difficulty of the lords approving: but if the grant was to the "*inhabitants*," it must be taken to have been intended by the lord and the grantees, that he should not exercise such a right. Approval.
ment.

The distinction was also again taken between a charge in the soil of another, and a discharge in his own; and an interest or profit, or an easement in another's soil. And some instances were mentioned, in illustration of that point. But to what do they amount in contradiction to the fact, that such rights of common had been granted to inhabitants, and enjoyed by them. Charge.
Discharge.

The distinction with respect to copyholders, is also with the same view, too subtle to require a comment: as well as that between custom and prescription, which, in the previous case, as to Benfield manor, are expressly declared to be all one. Copyhold-
ers.

As to the other reasons, they are too foreign from our present inquiry for us to dilate upon them. But it is somewhat strange that Lord Coke should, without a comment, report, "that a custom for an inhabitant, or resident, to "grant or take any profit, was merely void," when it is clear, that if incorporated, they could do so, and that Lord Coke himself asserts, that anciently grants were made to them, and that they held under them, though not incorporated.*

The ninth reason goes farther than any other, and states, "that if the custom had been alleged that every house-

* Vide Coke Lit.

James I. keeper in any ancient messuage had the right, it would have
1606. been insufficient."

Gateward's
case.

Under the particular circumstances of this case, it is very extraordinary that Lord Coke should expressly draw the attention to it as one well resolved. And he adds, "that no book in the law is adjudged against it," which, however, the cases quoted in argument above, show to be incorrect. Notwithstanding, therefore, the supposed authority of these cases, and that they have been currently adopted, without sufficiently considering the real grounds upon which they were founded, and the principles properly applicable to the subjects to which they relate, we must, with all becoming respect—but at the same time, with that confidence, which we trust, a careful investigation of the question will warrant—venture to dispute the grounds upon which they rest.

VILLAINAGE.

We have seen that the practice with respect to *freemen* as contradistinguished from *villains*, had in this reign essentially altered; and the original ground of distinction was falling into oblivion; on the other hand, the appellation of *freemen* was daily becoming more connected with trade than theretofore; and the general term of "*inhabitants*," which entirely overlooked the distinction between the bond and free, had come into general use.

1607. Yet the doctrine of *Villainage* was not forgotten, nor had it altogether ceased in practice. For we find in the fifteenth year of this reign, an instance in which an action of trespass was brought against C. for taking his horse, &c.* C. said that he was seised of the manor of D., to which P. was *villein regardant*; and that he, and all those whose estate he had, were seised of the plaintiff and his ancestors. The plaintiff said that he was *free*, &c. absque hoc,—that the defendant, &c., was seised of the plaintiff, &c., as *villein regardant*. And the issue was found for the plaintiff. And upon motion in arrest of judgment, it was ruled that the traverse was well taken.† And by Hubbard, "if a man hath not

* Noy's Reports, 27, C. B. Rot. 1966.—Pigg v. Calley. † Dyer 283, accordingly.

" *seisin of a villein* in gross, within *six years*, he shall be James I.
 " barred by the 32nd Henry VIII. of limitation in *nativo* Six years.
 " *habendo, for liberty is favoured.* But yet, of a villein re-
 " gardant, the seisin of the manor is sufficient seisin of the
 " villein."

We have already stated that villainage was essentially put an end to in the reign of Henry VIII. Booth, in his Booth.
Treatise on Real Actions, published 1791, says,* that the last cases in the books, as to villainage, are in the 11th and 44th of Elizabeth;† but it is clear that he was mistaken in this respect, for the above case occurs fourteen years after the date he assigns for the last.

The same learned author has a short chapter on "the writ *de nativo habendo*," in which he speaks of the lords and the villains or bondmen, as well as of the circumstances under which the sheriff may seize the *villain*, which he cannot do if he says he is *free*. He also states that the lord must have two of the same blood of the villain ready in court, to confess themselves villains to the lord. And for his authority he cites Fitz Herbert's *Natura Brevium*; respecting which Natura Brevium.
 author it should be observed, that he fully enters into the doctrine of villainage, and the writs and process connected with them, which is continued in all the editions of his work, two of which were in the reign of James I.: after that period there has been but little alteration in the subsequent editions.

It should also be remarked, that with respect to this case, there is a striking similarity in the English statute, which is quoted as to the limitation of six years, for claiming a villain, with the head of the Scotch law, contained in the *Leges Burgorum*, in which the period of *seven years*, as we have noted before, is fixed for the limitation beyond which Leges Burgorum.
 a villain shall be absolutely irreclaimable.

Before we finally close this head of the reign of James I., we should observe, with reference to another point, material to our inquiry, and connected with the early law, that there was

* Page 128.

† Dyer, 283; Yelverton, 2; Cro. Eliz. 881.

James I. a decree of the Star Chamber, in the twelfth year of the fol-
 1636. lowing reign, concerning *divided tenements* in London.

PARLIAMENTARY DECISIONS.

We have now, as far as regards England, nothing further to add in this reign, but some few collections respecting the *parliamentary* history of the boroughs, which, at this period, forms a striking feature in the progress of our inquiry.

For as the king had introduced the representatives of many *new boroughs* into the House; against which the commons had remonstrated, in the reign of Queen Elizabeth.—
 New boroughs. And as he had, by his charters, like his immediate predecessors, made many alterations in the constitution of the several boroughs:—it became essentially necessary that the House itself should interpose, and put some check upon the
 Charters. changes which had been effected—were then meditated—and which required, for the sake of the future, to be anticipated.
 Changes.

1625. This necessity created a jealousy in the House of Commons, which led to the formation of the celebrated committee,
 Committee in the twenty-third year of this reign, composed of men of the greatest talent and knowledge in the kingdom.

They executed the trust reposed in them by the House and the country, vigorously, faithfully, and conscientiously; and it will be our present task to give short extracts of the different resolutions at which they arrived—some few of them not altogether free from error; whilst the others contain more of the sound principles of the constitution, than probably any other work in our language in the same space.

NORFOLK COUNTY.

1. The Norfolk county case is not material to our inquiry,* excepting for the parliamentary principle ~~which is~~ contained in it—"that the House of Commons is not concluded by the opinion of any committee in matter of fact, no more than in matter of law."

* Glan. p. 3.

SOUTHWARK.

2. The *Southwark* case only establishes that there were certain watermen and others in that borough,* who had no voice in the election. One instance amongst many, to show that the *right of election was not generally in the inhabitants at large*; but in the burgesses who were the inhabitant householders—paying scot and lot, and being duly sworn and enrolled:—~~which were~~ the consequences of their being inhabitant householders.

Inhabitant
household-
ers.

Nothing more appears in this case to show who were the burgesses of *Southwark*, but its subsequent history, although it has been the subject of numerous parliamentary contests, may be shortly stated.

In the second year of William III., on a question of whether those housekeepers only, who paid scot and lot, had a right to vote; or the housekeepers and inhabitants generally;—it was determined, that the right was in “the inhabitants being housekeepers.”

1689.

Right.
House-
keepers.
1702.

In the first year of Queen Anne, the right of the inhabitants at large, was again insisted upon; but in answer, it was said, that “*none of common right ought to vote, but such as were liable to pay wages to their members, and those were only such as paid scot and lot.*”

On the other hand, it was contended, that all the housekeepers had a right to vote, and the decision in 1689 was cited; but the committee resolved, that the right was only in “*the inhabitants paying scot and lot.*”

Right.

In the tenth year, and also the last, of the same reign, the right was agreed to be as above.

1711.

At that time, the question was raised, that persons inhabiting in the Mint, or rules of the Queen's Bench, in the borough of Southwark, and paying a rent of 10*l.* per annum, or upwards, had a right to vote, though they did not pay scot and lot;—but it was disagreed to.

1714.

After that time the right was not disputed, but continued to be exercised by the *inhabitant householders*, and this,

Inhabitant
household-
ers.

* Glan. p. 7.

James I. notwithstanding, as we have seen before,* the property within
South- Southwark, was held by *burgage tenure*.

It was originally under the government of a bailiff. It is now one of the wards of the city of London, being called the Court leet. Ward of Bridge Without, and there are several *court-leets* within its limits, so that there can be no doubt but that the burgesses were not only, according to the modern decisions, *householders paying scot and lot*, but also according to the common law, were *sworn* at the *court-leet*.

WINCHELSEA.

3. The next case reported by Glanville, is *Winchelsea*, in which it was assumed,† no doubt upon authority of the “*modus tenendi parliamentum*,” which was, at that time, considered authentic; that Winchelsea had returned burgesses to Parliament by *prescription*,—an assumption, which the fact of there being no representation of the commons, till the reign of Edward I., nearly a century after the time of legal memory, now clearly disproves.

It seems also to have been assumed, that Winchelsea was *incorporated* by *prescription*, which is also as distinctly negated.

The *freemen*, according to the prevalent opinion at that time, seem also to have been assumed to be the members of the corporation, and not the *liberi homines* of the common law, as we have shown they ought to have been.

In these respects, therefore, this case appears to have proceeded on erroneous grounds; which, however, were not the points on which the decision was founded, but upon a bye-law of the 7th James I., which assumed the necessity of *residence*, and declared that no *freemen* should vote, but such as had been *inhabitants* for the space of three months next before the election; and an objection was made to two of the jurors, on the ground of *non-residence*; because they had not complied with that bye-law, although they had empty houses within the town,—had *dwelt* there within a year and a day,—and had paid *scot and lot*, and enjoyed

* See before, p. 1150.

† Glan. p. 12.

their other rights as *inhabitants* and *freemen*. The mayor had rejected their votes, and claimed himself a casting voice.

James I.

Winchelsea.

Bye-law.

The committee, in the first place, most constitutionally decided that "the *bye-law* could not alter the right of election, but was, for that purpose, utterly void, for that the freedom of election could not be restrained by any private ordinance."

And, secondly—in perfect accordance with the true doctrine of the law—that as the two voters kept houses in the place, they might return at their pleasure: and as they had not been absent *a year and a day*, and it did not appear that they removed to dwell elsewhere, with a purpose of settling there; they were, by the common law, such *inhabitants* as ought to vote.

Inhabitant

The right of the mayor to a casting vote, was negatived by the committee, and there is nothing more in the report which relates to the burgesses.

The subsequent history of Winchelsea will show, that the erroneous assumptions of the parties and committees, in the particulars we have alluded to, afterwards rendered this borough an instance in which the supposed corporate right of election led to the greatest abuses.

It appears that in the next year, a mayor obtruded himself into the office, without any authority, and arbitrarily disfranchised many of the freemen.

1624.

Between 1623 and 1711, many instances of the grossest bribery occurred in this borough; and two of the mayors were brought before the House, and severally reprimanded for their conduct.

In the tenth year of Queen Anne, the right was again agreed to be in "the mayor, jurats, and freemen." But—as one of the effects of the right being supposed to be *corporate*—a question arose whether the freemen were obliged to *qualify* under the test acts. The committee properly decided, that they were not; considering that they were not officers, as we have already pointed out, and as had been adjudged by the courts of law.

1711.

Another effect of the same assumption, that the freemen

James I. of Winchelsea were *corporators*, and to be arbitrarily elected
 Winchelsea. at *assemblies* of the corporation, instead of being *presented*
 Corporators. according to the facts of their qualifications, of *paying scot*
 and *bearing lot*, and *inhabiting* within the borough, was,
 that as a contrast to the opposite inconvenience of such a
 power allowing any indefinite number to be admitted, which
 has been pointed out, the freemen were reduced to the
 smallest possible number: and as the other corporate abuse
 Non-residents. was also introduced of *non-residents*, the entire control of
 the right of election was altogether by these means, put into
 the hands of persons unconnected with the borough. And
 a third consequence of the first fatal error was, that the right
 Quo warranto. of election was mixed up with questions of corporation law,
 and in the reign of George III.,* led to the expensive
 and vexatious proceedings which are reported in the law
 cases of that time, and which, like the Chester case, involved
 in ruin many of those who were engaged in them.

STAFFORD.

4. The case of *Stafford*† merely relates to the avoidance of the election, on the ground of want of due notice and warning.

BLECHINGLEY.

5. The next is that of *Blechingley*,‡ which is the first instance, of the *burgage tenure* right of election being recognized by the House.

It is impossible to suggest any reason why that right should have been adopted for this place. There is nothing in its early history to warrant it; whilst, on the other hand, there are numerous places which have been clearly shown to have been held by burgage tenure, and where there were ancient burgages, and yet the right of election has always been in the inhabitant householders paying scot and lot, as the burgesses.

Why, therefore, this right was assumed for Blechingley cannot be explained.

* See 2 Bur. Rep.

† Glan. p. 25.

‡ Glan. p. 29.

In the second year of the reign of Henry V., the return was made in the county court, which we have already seen was the case with many boroughs, where the right is in the inhabitant householders; as well as places where other rights prevailed.

James I.
Bleching-
ley.

On another occasion, in the reign of James I, the right of the "borough-holders," as they were called, was assumed without any discussion or evidence.

1623.

If, as we have shown before, they had been confined to the actual *householders*, the right would have been consistent with the common law. The error was, in treating the *freeholders*, and not the *resiants*, as the burgesses; by which *non-residents* were introduced, and the whole power over the elections was delivered into the hands of the owner of the lands, who could deal with it as he thought fit.

In the course of this inquiry, it appears that, in imitation of the interference which we have noticed in other places, Lady Howard was reported as having said, that, "she would take away twenty nobles a-year from the town, if they did not choose as she desired." There is also some reference in the report to *inmates*, who, consistently with the common law, were assumed to have no right.

Inter-
ference.

Inmates.

The probable error upon which this case proceeded was, the adoption of the right of the burgage-holders, as a custom of election used time out of mind; which, for the reasons we have given before, could not possibly have been the case; and yet the attempt to vary from it was called an "innovation."

It was truly stated, that Blechingley *was never incorporated*; and yet its right to return members was not in the slightest degree doubted. It is therefore clear from this as well as other cases, that the right of election is *not necessarily*, as sometimes assumed, a *corporate right*.

Never in-
corporat-
ed.

Blechingley is stated to be a *borough by prescription*, which may perhaps be true: but it is not mentioned as a borough in Domesday; nor are there traces of any early charters granted to it.

It returned members from the earliest time; and this

James I. seems to be the only ground for assuming that it was a
Bleaching- borough by prescription. But the first return, it must be
ley. remembered, was nearly a century after the time of legal
 memory.

Burgage Were it, however, even a borough by prescription, it would
tenure. by no means follow that the burgage right of election should
 prevail there; for we have seen that some of the *most ancient*,
 returned their members by the *inhabitant householders, pay-*
ing scot and lot. On the other hand, the principal part of
 those boroughs in which the burgage tenure right of election
 is supposed to prevail, are by no means the most ancient.

Burgages. Still the committee, in this instance, seem to have relied
 upon the *assumption*, that there had been there immemorially
 divers burgages or borough tenements; but that fact was not
 proved; and, if it had been, it would have established nothing
 to the point; for that was the case with all the ancient
 boroughs. They also further *assumed*, that the borough had
 immemorially returned members to Parliament, chosen by the
 burgage-holders; which we have already shown it could not
 have done.

It seems that only the burgage-holders attended at the
Inhabitants election, and not the rest of the *inhabitants*: although the
Bailiff. *bailiff* gave notice in the church for the burgage-holders and
 all the rest of the inhabitants to meet to elect the burgesses
 for the Parliament. The next day, the *inhabitants* met and
 made a return.

The committee resolved, 1st. That "however of common
 "right, in a town which is a parliamentary borough by pre-
 "scription (of which there are certainly none), where no
 "constant *custom* for election doth appear, more persons than
 "in this case ought to have voice in the election: yet by pre-
 "scription, or custom time out of mind used, the election
 "might be restrained to a fewer number."

Here it is evident the committee were in error; for as
 there are *no prescriptive parliamentary boroughs*, so there
Prescrip- could be no prescription or custom as to the right of elec-
tion. tion; and that proposition failing, the whole resolution falls
 to the ground.

It is well known that Sir Edward Coke, one of this celebrated committee, relied upon the authority of the *modus tenendi Parliamentum*; which he assumed and maintained was a genuine work. But as it is now an established fact that there was no representation of the commons before the time of legal memory, we have before us both the cause of the error, and the means of refuting it.

James I.
Bleaching-
ley.

No Com-
mons.

This case was also distinguished by the committee from that of Winchelsea, by the same supposed *custom* of election which we have already answered.

They then proceed to explain some returns which were given in evidence, of the reigns of Edward VI. and Philip and Mary; from which it appeared, that the election had been made by certain burgesses specially named, and all *others* of the *commonalty*; it was also inferred, from those expressions, that the "*others*" must have included the residue of the inhabitants. But the committee held, that those terms were not conclusive; and by somewhat artificial reasoning they surmised, that they might mean "the others not specially named." However, they do not appear in any manner to have accounted for the use of the word "*commonalty*;" and notwithstanding it occurred in the return, they somewhat hastily asserted, that there was no proof produced that any of the inhabitants not burgh-holders had ever voted.

Returns.

And others.

Common-
alty.

The second resolution was, that the lord's bailiff—the same being no corporation, nor the bailiff the head officer there, but only the lord's minister—was not such a person as ought to have the charge of the election. This was undoubtedly an extraordinary view of the subject; for the not being a corporation, could have nothing to do with the question, whether the bailiff ought to be the returning officer or not? And it is strange that it should be questioned, whether the lord's bailiff was the head officer of the town; for we have seen that the mayors, provosts, and portreeves were nothing but the king's bailiffs, and the lord must be mediately or immediately the representative of the king; and therefore, in analogy to every other place, the bailiff would have been the returning officer. This resolution of

Bailiffs,
&c.

James I. the committee is the more singular, because there does
 Bleching- not appear to have been any other head officer, and the bailiff
 ley. had always before that time presided at the elections. It was,
 therefore, most extraordinary that, there being such an
 officer, the committee should still have held that the writ
 was properly delivered to one of the electors, instead of him.

Some constitutional doctrines with reference to the suffi-
 ciency of the precept, as well as of the power of any elector
 Returning to act as returning officer, where there is none other appointed
 officer. by law, are laid down in this case. But as such points, as
 well as the resolutions respecting the conduct of one of the
 candidates, are immaterial to our present inquiry, we shall
 pass them by, without any other observation, except that the
 Times. proceedings on all sides seem to have partaken so much of
 the violence of those times, that the extraordinary decisions
 of the committee in this particular instance may probably
 be accounted for on that ground.

Early We should also observe, that this case, as well as the
 Charters. Winchelsea, appear to have been decided without any re-
 ference to early charters or records ; excepting the two returns
 in the Blechingley case, which the committee disregarded.

The non-production of any records may, perhaps, be ac-
 counted for from the confused state in which they were kept,
 as no attempt was made to arrange them till the beginning
 of this reign.*

Calendar. The *Calendar of the Charter Rolls*, contained in three
 volumes, preserved in the Record-office in the Tower, and
 from which the *Calendarium Rotulorum Cartarum* was pub-
 lished by the record commissioners in 1803, is supposed to
 have been written some time during this reign.

The resummoning some of the ancient boroughs in the
 reigns of Henry VIII. and Queen Elizabeth—the inquiry into
 the right of some of these places to return members to Par-
 liament, to which allusion has already been made—coupled
 with the recommendation to James I. to adopt the same
 course, but which was rejected by him as far as related to
 England, though not as to Ireland, might have led to the

* See Ayloffe's Introduction to the Calendar of the ancient charters.

formation of that calendar, for the purpose of referring to James I.
the ancient charters of the different cities, boroughs, and Bleching-
towns. ley.

Be this as it may, it is certain that the *assumption* of a prescriptive right of election, which was adopted in both these cases, was unfounded; and the committee do not appear to have had before them sufficient documents to enable them to correct the error into which they had fallen.

Blechingley never recovered from the effect of this decision, but always after continued a burgage tenure borough, which placed its election altogether at the disposal of the owner of the borough; on which account it often became the subject of purchase and sale, and was, perhaps too justly, suspected of great venality.

Burgage
tenure.

6. The next case in Glanville* is *Chippenham*, the history of which we have already given,† it does not therefore require repetition.

DOVER.

7. The next report is that of Dover,‡ which proceeded upon two petitions, the one by the *free barons* or *freemen inhabitants* of Dover, complaining that they were not warned to the election;—the other by the mayor, jurats, and common council, alleging, that they had proceeded as had been usual for above sixty years, ever since the third of Elizabeth.

It was in this case also erroneously *assumed*, that Dover had sent burgesses to Parliament by prescription or custom time out of mind used.

It was stated to be incorporated—which, in fact, took place in the 20th of Charles II.

1668.

It was truly added, that the commonalty were anciently all the *free barons, or freemen, inhabitants* of the port. But that at a customary assembly of the court called, “a com-
“mon Horn-blowing,” (because it was summoned by the blowing of a horn), in the third year of Queen Elizabeth, it was by the mayor and whole commons, or commonalty,

Bye-law.

* Glan. p. 47.

† See before, 1189.

‡ Glan. p. 63.

James I.
Dover. agreed, that there should be 37 of the most discreet commons, to be chosen by the mayor and jurats, who should have power for, and in the name of the whole commons, to choose all officers in the town, as burgesses to the Parliament, and all other officers, which had been accustomed to be elected and chosen by the commons; and such 37 were afterwards elected, and called the common council: and they only for the whole commons, or commonalty, had joined in the choice of burgesses to Parliament, and other elections: and they were summoned for this election; but divers other free barons, or freemen inhabitants of the port, though not summoned, came and claimed to have their voices, but were denied.

1st Reso-
lution.

The committee determined, first, That “the ordinance of the third of Elizabeth, *notwithstanding the antiquity thereof, ought not to conclude the right of the other free barons or freemen*, inhabitants of Dover, nor ought to prejudice the interest of the commonwealth, by restraining the freedom of election to Parliament, for the reasons delivered in the cases of *Winchelsea* and *Chippenham*:—However, it might regulate the election of the officers of the town.”

2d Resolu-
tion.

Secondly, That “the long and constant usage should not be considered as showing that the ordinance was declaratory, and a confirmation of a former ancient usage; notwithstanding, it was inconvenient to disturb a course of election so long settled.”

“For it appeared by the ordinance itself, that it was a mere *innovation*; for there *was no such name or number as 37 before*:” and it recites, that the former election had been by the commons; and if there had not been time out of mind such a qualified number as 37, it was impossible that any custom or prescription could be settled in them.

The points with respect to the warning, or the exclusion of the electors, are not material to our inquiry; and the other part of the history of Dover has been previously given.

It is sufficient, in conclusion, to add, that it is clear the burgesses or barons of Dover were then the *free inhabitants*: But *non-residents* have been *since* admitted.

ARUNDEL.

8. The next case which is reported is that of *Arundel*, to which we have before referred;* and it is only necessary to add further with respect to it,—that it is one of the oldest towns in England,—that it is a borough by prescription, being so called in Domesday,—and that the right of election in it has been twice decided to be in the *inhabitants paying scot and lot*, who have always exercised it. It must however be admitted, that the Malt-House Club, like the Christian Club at Shoreham, has given it a notoriety in corruption. Notwithstanding this place is stated to have been incorporated in the reign of Queen Elizabeth,† the members of Parliament have always been elected by the *inhabitants*; and a *court-leet* has been constantly held there. There is, therefore, no doubt that the *inhabitant householders* paying scot and lot, and consequently *enrolled* and *sworn* at the *court-leet*, Inhabitants
Court leet. were the real burgesses of Arundel.

NEWCASTLE-UNDER-LYNE.

9. The case of *Newcastle-under-Lyne* is next reported; the early history of which it may be proper shortly to state.

This place is not mentioned as a borough, either in the Saxon Annals or in Domesday. The first trace which occurs of it is in the second year of Richard I., in the roll of the tallage of the demesnes and lands of the king:—but the *men* of the place, and not the burgesses, are spoken of; and, consequently, this document does not show that it was then a borough.

The *men* of Newcastle are again mentioned in the same Men. manner, in the ninth of Edward I., in the grant of a fair.

The borough first returned members in the 28th of Returned. Edward III., ever since which it has exercised the elective

* Vide ante, p. 98.

† There is no trace of the existence of a municipal charter to Arundel, in the reign of Elizabeth, among the patent or confirmation rolls, at the Rolls Chapel.

James I. franchise. And in the 31st year of the same reign, there was
 Newcastle a grant to the *men* of the borough.*

under
 Lyne. The return for this place came before the committee, upon
 1624. a petition by Mr. Keeling.† Although the account of this
 case given by Glanville, and that which is contained in the
 short entry in the Journal, differ in some respects, each being
 fuller than the other on particular points, yet in substance
 they nearly agree.

Notice. The report of the case by Serjeant Glanville turns merely
 upon the want of due warning, and the undue taking of the
 Poll. poll, on which ground the election was declared void as to
 one of the members returned. But nothing appears as to
 the right of election. In the Journals‡ it is stated, that
 the custom was for the mayor, aldermen, two bailiffs, and
 24, and all the common council, to return; which is said to
 have been proved by an ancient indenture. A thing highly
 improbable; for there does not appear to be any indenture
 which would justify such an assertion, and the practice has
 since been for the body of freemen at large to vote.

Bye-law. But it is further stated, that they had a new charter, and
 had made a *bye-law*, that the mayor, two bailiffs, and chief
 burgesses should elect. Accordingly, the chief burgesses
 elected—none of the commonalty being in the upper room,
 as we have seen before in the *Chippenham* case.

And it was resolved, as in the *Chippenham* case, that “the
bye-law could not alter the former custom.”

Newcastle-under-Lyne was incorporated by a charter of
 Charles II. But, as it had returned members to Parliament
 for centuries before, it is clear, from the authority of the
Chippenham case, that the charter could not have altered or
 affected the right of election.

1703. After this time, many petitions were presented against
 the returns for this place, but no report was made till the
 Right second year of Queen Anne, when the right of election was
 agreed. *agreed* to be in the *mayor, bailiffs, and burgesses*; a right,
 resolving itself, as has been observed before, into the right

* Pryne, 1074.

† Glan. p. 76.

‡ 1 Journ., p. 761. April 9, 1624.

of the *burgesses*, which is capable of being extended, and in law ought to be extended, to the *inhabitant householders*. But in this case it was, according to the then notions of freemen, limited by the farther agreement of the parties to "the *sons of freemen*, born whilst their fathers were *resident* within the borough, and those who had served apprenticeships, *demanding to be made free within a year after their apprenticeship expired*." And it was also agreed, that "the *burgesses, being out of the borough a year and a day*, had no right to their freedoms."

James I.

Newcastle
under
Lyne.

The observation already so often made, must here be repeated, that the agreement of the parties could not alter the right of election.

The only reasonable mode of accounting for the supposed superior right of the sons of freemen and apprentices, has been before explained.

But from these agreements, one most material inference is to be drawn, that it was assumed on all hands, that *residence* was necessary, for it is expressly said, that "burgesses residing out of the borough, a year and a day, had no right to their freedoms." And the necessity of apprentices claiming their freedom within one year, seems to have been founded on the same principles of the common law.

Residence.

Year and
a day.

It is worthy of observation also, that the doctrine of the year and a day is borrowed from the law of *frankpledge*, by which a person residing for that period within a borough, even if he were a *villain*, became *free*: and, as a consequence, was both *bound* and *entitled* to be *sworn*, and *enrolled* in the list of *resiants*, at the *court leet*; such a person, during the year, if he was in pledge in any other place, was only *bound* to do his suit where he was in pledge; but after the expiration of the year, he was *bound* to do it at the place where he then resided, and became released from the suit at the place where he before dwelt;—as is stated in this agreement of the right with respect to the burgesses of Newcastle.

It would therefore seem impossible not to attribute this effect of *non-residence* for a year and a day to the law of frankpledge, with which it so entirely coincides; and there is

Frank-
pledge.

James I. no ground for thinking that such a provision had any sort
 Newcastle of connexion with the admission of *freemen* into any *trading*
 under Lyne. *corporation* or society.

Sitting According to the practice of other corporations it appeared
 member's that the mayor, on the day of election, made some free who
 case. demanded their freedom.

Void The committee declared the election void.
 Election.

1706. In the fourth year of Queen Anne, there was another peti-
 Right tion; when it appeared that the right was *agreed* to be in the
 agreed. mayor, *bailiffs*, and *burgesses*, or *freemen resident*.

The introduction of the term "freemen" in this *agreed* right, as a synonyme for "burgess," is a decisive indication of the attempts which were at that time made to convert the ancient common law "burgess" into the "freeman" of incorporated societies, under the control of their immediate heads.

Resolution The committee resolved, that the petitioners were duly elected.

1715. There have been other petitions against the return for this place, but they do not affect the right of election, excepting that one of the 2nd of George I., speaks of "*born burgesses*," and others who had served *apprenticeships*.

1792. Upon another petition, in the 33rd of George III., the merits depended partly upon the right; the committee called
 Statements upon the parties to deliver *statements*, according to the statute, which was accordingly done.

For Peti- For the *petitioners* it was asserted,—that the right was in
 tioners. the "mayor, *bailiffs* and *burgesses* or *freemen*, whose place
 "of *residence* at the time of their giving their votes, was in
 "the borough, or who at such time had *no place of residence*
 "elsewhere, and who had never been absent from the borough
 "for the space of *a year and a day*, without interruption, since
 "they were admitted to the freedom thereof; or whose fami-
 "lies (if they were masters of families) had not been absent
 "for that period, without interruption, after the time of the
 "admission of such *burgesses* or *freemen* having families,
 "to the freedom of the borough."

For sitting For the *sitting members*, it was said, that the right was
 members.

in the "freemen *residing* in the borough, and not receiving "alms or church bread; and that persons living a year and "a day out of the borough, lost their freedom."

James I.
Newcastle
under
Lyne.
Determi-
nation.

The committee negatived both these rights, and determined that the right was in *freemen residing in the borough*.

The statement for the petitioners appears to have been drawn up with reference to the law of frankpledge; excepting that it assumes that the burgesses and freemen were the same, which assumption has created most of the difficulties in the borough right of election.

Frank-
pledge.

Resting the right upon the sound ground of fixing it where the person had his real domicile, is perfectly in conformity with the law of the leet; and the sitting member also adopted the proper distinction as to the absence for a year and a day.

Domicile.

But the committee, by its decision, rejected all these wholesome doctrines of the common law;—rejected the peculiarly appropriate term of "*burgess*," to be met with in all the writs and returns, from the earliest period; and adopted the newly-introduced term (at least in this sense) of *freemen*, leaving the making of them entirely in the discretion of the corporation, whose creatures they must be:—no other restriction being imposed but that of residence:—which is, however, so far constitutional, that it confines the right to *inhabitants*; but is unconstitutional, inasmuch as it may not include all the duly qualified inhabitants.

In conclusion, it should be remarked, that notwithstanding the modern corporate right of election was thus established in this place, ancient *burgage tenements* have always existed in it, and are so mentioned in a recent case ~~at law~~, which therefore would appear to justify a burgage tenure right of election, if it had any real foundation in law.

CAMBRIDGE COUNTY.

10. The case of the *county of Cambridge* is not material to our inquiry.

James I.

AMERSHAM,
MARLOW,WENDOVER,
HERTFORD.

11. Nor those of *Amersham, Marlow, Wendover, or Hertford*, except for the purpose of observing, that during the debate respecting them, Sir Robert Heath, then solicitor-general, stated "that information had been given to the king, that many other boroughs in several parts of the realm might make the like claim as these, which might, peradventure, give occasion of offence to his majesty, if they should all come to be restored, from this example, and so *cumber* the Commons House of Parliament with an *excessive and unnecessary number*;" following up the declaration of his majesty, to which we have before referred, that he was unwilling to have the number of burgesses increased, declaring "that he was troubled with too great a number already." And it is said that the king commanded the then solicitor-general, Sir Robert Heath, being in the House, to oppose it what he might; and most of the Commons, understanding the king's inclination, did their utmost endeavours to cross it.

But it is curious to remark the decisions as to the class of burgesses in these four places, all restored under similar circumstances.

- Amersham** As to *Amersham*, in the 32nd of Charles II., the right
1680. was decided to be in the *inhabitants* only, who paid *scot and lot*.
1698. In the tenth year of William and Mary, the right was *admitted* to be in the *inhabitant housekeepers*; and objections were taken to persons who only held *parts of houses*, and to some who were inhabitants by *certificate*.
1705. In the 4th of Queen Anne, the petitioners insisted that the right was in the *householders*. The sitting member, on the other hand, stated that the right was only in such housekeepers as paid *scot and lot*; the one being called "the long pole," the other the "short pole;" and evidence was given on both sides; but the committee decided that the right was in the *inhabitants paying scot and lot only*.

And it appears that the returning officers were the *constables*. James I.
Amersham

As to *Marlow*, in the 32nd of Charles II.—the same year Marlow.
as the decision relative to *Amersham*—it was determined that 1680.
the right was in the *inhabitants* only, who paid *scot and lot*.

In the second of William and Mary, the petitioners insisted 1690.
that the right was in the *inhabitants and householders*—the
sitting member in the *inhabitant householders*, who paid *scot*
and lot. And it was resolved, that “*those inhabitants who*
“ paid scot and lot, had a right to vote.””

And in this instance also, the *constables* appointed at the
court leet, were the returning officers.

As to *Wendover*, in the first year of Queen Anne, the right Wendover.
of election was agreed to be in the *inhabitants, being house-* 1702.
holders. Some were objected to, as coming to reside in the
borough by *certificates* from other parishes; and it was re-
solved, they had not a right to vote.

Some, also, were objected to as not being housekeepers,
but *living with others*. And the returning officers in this
place were also the constables.

The history of *Hertford* we have already given,* in which Hertford.
it will be remembered it appeared that, notwithstanding at
one time non-resident freemen had been made by the cor-
poration, and at another, non-residents were allowed to
vote by a committee of the House of Commons—they were
eventually excluded, and the right was at length properly
fixed, according to the common law, in the *inhabitant*
householders; but the freemen of the corporation, (this being
the only case of the four at that time restored to the elective
franchise) were allowed to vote: but they were restrained
to *residents*.

STOCKBRIDGE.

12. The *Stockbridge* case is foreign to our inquiry, relating
only to the presumption of due warning being given, unless

* Vide ante, p. 174, et seq.

James I. the contrary was proved.* The petition was by the *inhabi-*
 Stock-*tants*; and we have before† shown, that the right was always
 bridge. exercised in Stockbridge by them, as well as that there had
 Inhabitants always been a *court leet* held there, at which all the *house-*
 Court leet. holders attended, and continue to do so to this day.

GLOUCESTER COUNTY.

13. The case of the *county of Gloucester* also, related only to the liability of a member to serve, though elected against his consent:‡—secondly, that the departure§ of some of the freeholders before the poll, could not defeat the election;—and, thirdly, that the votes of those who came after the poll began ought to have been received.

CIRENCESTER.

14. The case of *Cirencester* we have also commented upon before,|| as far as necessary for our present purpose, and have also given a short account of its parliamentary history.¶

HAVERFORDWEST.

15. The *Haverfordwest* case only determined, that a petition might be adjourned till the next session.**

MALMSBURY.

16. From *Malmsbury* there was a petition by the *inhabitants*;†† but the petitioners not appearing to support it, the sitting member was confirmed in his seat.‡‡ Hereafter we may have occasion to mention this borough again.

MIDDLESEX.

17. The cases also which follow are not material. In that of the county of *Middlesex* the question was, whether the petitioners,§§ being desirous to withdraw the petition, the committee were prevented from proceeding with it; and it was held that they were not: but as there was no ap-

* Glan. p. 97.

† See before, p. 1123.

‡ Glan. p. 99.

§ So also the Cirencester case; Glan. 106, fourth resolution.

|| See before, p. 1281.

¶ Glan. p. 104.

** Glan. p. 112.

†† Glan. p. 115.

‡‡ Vide post. temp. Will. III.

§§ Glan. p. 117.

pearance of fraud or practice in withdrawing it, the committee James I. permitted it to be done as desired.

MONMOUTH.

18. In the *Monmouth* case* the question was, whether a native of Scotland, made a denizen of England, was eligible as a member to Parliament. And two instances were mentioned of such persons sitting. To which it was answered by the committee, that in those instances no question was made, nor exception taken to the returns, so that it did not appear to the House that they were aliens; and, *prima facie*, every one who is returned, is presumed to be capable of sitting until the contrary is shown. But the committee decided, that, in this instance, the individual was not capable of serving as a member. And, as he was incapable at the time of his election, he could not afterwards, even by being naturalized by act of Parliament, be rendered fit to serve.

CUMBERLAND.

19. In the case of the *county of Cumberland*,† one of the knights of the shire was objected to, as outlawed at the time of his election; and, after debate, the House resolved, that the party was eligible notwithstanding his outlawry.

RETFORD.

20. The parliamentary and municipal history of *East Retford* we have already given;‡ and this case, reported in Glanville,§ contains no further matter to which it is at all necessary for us to refer.

POMFRET.

21. The only remaining case is that of *Pomfret*,|| which is so important, that it will require a particular investigation:—having, at one time or the other, exhibited in its history each of the supposed rights of election of “burgage tenure,” and

* Glan. p. 120.

† Glan. p. 124.

‡ Vide ante, p. 468, 1258, 1282, 1298.

§ Glan. p. 128.

|| Glan. p. 133.

James I. "corporate right;" but it has eventually been decided to be Pomfret. in the "*inhabitant householders resident*."

It is not mentioned in Domesday, although in the report of the case respecting this place, in 1791, by Mr. Fraser, it is stated, that it is mentioned as a borough in Domesday, and that the tenants are called "burghers:" in truth, there is no mention whatever of its being a borough; still less of the burghers. There is some obscure mention* of a castle, but it is doubtful whether it is applicable to this place or not. And it is suggested in Fraser's Reports,† that the entry of "Tatteshalle," in Domesday, refers to Pomfret, which is very questionable; and if it does, there is in that entry only mention of the "*burgenses minuti*," which cannot support the inference that they referred to what is called the "burghers," as descriptive of the burgage tenants.

Pomfret returned members to Parliament, as early as the 23rd and 26th of Edward I.;‡ after which it intermitted till it had obtained a charter from James I., in the fourth year of his reign.

1403. We have before seen that there was a charter to Pomfret, in the fifth year of Henry IV.,§ but it was not one of incorporation: nor was the borough, in fact, incorporated till the first year of Richard III.

1621. In the 19th of James I., having previously received the charter in the fourth year of his reign, it was moved in the House, that it should return members to Parliament: and, on that occasion, it was proved, that in the 10th and 11th of Henry VI., a return had been made from this place that they could not send members, by reason of their *poverty*, and a new writ was ordered.

1624. In the 22nd of James I.,|| a petition was presented against the return for this borough, the election of one person having been made by the mayor, some of the aldermen and burgesses; and another by some of the other aldermen and burgesses.

Resolutions were made with respect to these returns,

* Domesd. tom. 1. p. 373 b.

† 1 Fraser, p. 417.

‡ 1 Journ. 572, 576.

§ Vide ante, p. 798, 1035.

|| Glan. p. 134.

which are not material to our subject; excepting that by James I. one of them it was determined, that the precept was well Pomfret. directed to the mayor, aldermen, and burgesses.

The question upon the double return having been settled, the merits of the election were considered by the committee.

The facts are then stated in the report. But, like many of the other statements, some of the assertions are not correct. The first is, that it was a parliamentary borough by prescription, which we have abundantly shown could not be the fact.

It is also stated, that Henry IV. incorporated it, which we have also negatived before. And in truth, the charter only grants the power to assemble in the Mote-hall,* and elect from themselves thirteen comburgesses, twelve besides the mayor,—no doubt, originally, the *jury*.†

Jury.

After this, follow the resolutions of the committee, which are important, and worthy the fullest consideration.

It was agreed by the committee, 1st. That “where no “constant and certain *custom* appears, who should be the “electors in a parliamentary borough, then recourse must “be had to the *common law*, or *common right*.”

1st.

From the investigation which has taken place since the time of this resolution, into the records of Parliament, and the returns which have been brought to light, it is now clear, that there can be no “*custom*” for returning members to the House of Commons, for that *body did not exist before* the time of legal memory. And therefore this doctrine, (the qualification being removed,) must apply to all boroughs and, consequently, in considering who have the right of

* See before, p. 793.

† A recital occurs in the above charter, similar to those we have seen in *Northampton*, *Leicester*, and *Winchester*. That the king had been informed, that the election of mayor had been made by the greater number of the voices and suffrages of the burgesses of the town or borough; but upon account of that mode of election, controversies had arisen between the mayor, comburgesses and burgesses, and that the peace had been disturbed; that to prevent which, for the future, at the annual election of mayor, *every burgess* of the town or borough, except the comburgesses, should inscribe his suffrage upon a little scroll of paper, (“in parva pecia papiri”) which he should place in a bag or box, to be provided by the mayor and burgesses for that purpose.—Vide ante, pp. 231, et seq. et 906.

James I. election; or, to speak more definitely, *who were the burgesses*; recourse must be had to the "*common law*," (which it has been the leading object of this undertaking to enforce,) or to "*common right*," which is defined before in the *Cirencester* case.

2ndly. Secondly, it was agreed,—that the charter of Henry IV. (which is incorrectly stated to be a charter of incorporation), did not in words extend, nor could the matter of any charter *be of force to abridge or alter* that common right, in case of an election to Parliament.

This position, like the former, decides the point we have throughout maintained: for as the common right, in the *Cirencester* case, is declared to be for all *men, inhabitants, householders, residents*, within the borough to vote—so, by this rule, that *right cannot be abridged or altered by any charter of the crown*;—the doctrine we have throughout asserted. And, in truth, as is here also stated, and as we have shown with respect to every charter quoted, *they did not purport or intend to alter the right of election*, but rather to confirm it;—and there is nothing to support the contrary position, except the false constructions which have been imposed upon the charters.

3rdly. Thirdly, the common right was again laid down as in the former case of *Cirencester*.*

4thly. And in the fourth resolution it was again said, that the Electors. term "*electors*" comprehended all *inhabitants, householders, residents*.†

In the report of the same case in the Journals,‡ one of the mischiefs attending the arbitrary power of the corporations to make freemen is recorded; for it is said, *that 40 persons were made burgesses to carry the election*.

We have before had occasion to remark the abuses and usurpations which arose from the contending parties taking

* See before, p. 1281, and Glanville, p. 170.

† The limiting the right to the *residents*, who were the suitors at the *court-leet*, is perfectly justified in Pomfret, as a court of that description was held in the borough; although, in some of the documents, it seems to have been mistaken for the court baron.—1 Saund. 134.

‡ See Journal, April 1st, 1624.

upon themselves to fix the right of election by their own James I.
agreement; and it is singular, that the House, or the com- Pomfret.
mittees, should ever have permitted so great an irregu-
larity. Pomfret affords a most striking instance of this—for 1699.
in the 11th year of William and Mary—only 75 years after
the full inquiry into the right of election, which is reported
in Glanville; and after the cautious and constitutional deter-
mination at which the committee arrived, of the right being
in the "*inhabitant householders resiant*,"—the parties *agreed*
that it was in such persons as had an inheritance in *bur-*
gage tenure within the borough;—which, if permitted to
prevail, would in point of fact have given to the electors a
power which the king could not exercise by his charter, nor
any other power in the state, excepting the Legislature, by
a summary alteration of the constitution—which, of course,
it would not be likely to make without the most urgent
necessity.

Nor can any thing prove more convincingly the unjustifi- Burgage
able grounds upon which the *burgage tenure* right of voting tenure.
has been founded, than that the parties to the inquiry in 1669.
1699, should have taken upon themselves to agree that the
right in Pomfret was of that description.

And with reference to that right, it seems that they speedily
introduced the abuses which have so generally accompanied
it;—as it appeared in evidence, that "*many deeds were made*
to enable persons to vote at the election;"—and the usual
frauds were attempted, of several persons voting for the
same *burgage*. Some of the deeds appear only to have
been dated two or three days before the teste of the writ;
and evidence was also given of bribery and treating.

The election was declared to be void.

Election
void.
1715.

In a report on a second petition in the second of George I.,
it was stated, that it was *agreed Pomfret* was a borough by
prescription—and that the right of election was *agreed* to be
in those who had a freehold of inheritance, and paid a
burgage rent. And in the course of the evidence it was
proved, that 41 voters had been tendered for the petitioners;
in proving whose titles before the committee, it appeared

James I. that the consideration-monies had only been paid by notes given for them. And on the other side it was contended, that many of the votes were *split votes*—some were not burgage tenants—and others had no title—and there was a fee-farm book of the burgage tenants, in which there were 40 or 50 *alterations made in the same clerk's hand-writing, differing from former books; the rents being changed to make or not to make a burgage rent, as should favour the sitting members.*

1770. In the 10th of George III., the election at this place was again investigated. The return was by the "*inhabitants, householders and residents*;" but the House, misled, no doubt, by the last *two agreements* of the parties; and evidence being given only on one side; resolved, that the "holders of burgage tenures only were the voters."*

1775. In the 15th of George III., the right of election was again disputed,† the question being, "Whether the resolution of 1624, or that of 1770, was to be considered the last determination of the House."

It was truly stated, in the course of the argument, that no charter anterior to that of Henry IV., mentioned by Glanville, contained any regulations relative to the right of election:—and it might be added, that the subsequent charters are also destitute of any clause to that effect. In fact, the charter of Richard III. grants the same liberties which were enjoyed by the *inhabitants* of Stamford,‡ where the election was in the *inhabitants* paying *scot and lot*.

1783. In the 23rd of George III., the right of election for Pomfret again came before a committee. The sitting member insisted upon the "burgage right," and the petitioner for the "*inhabitants*."§

The committee resolved in favour of the latter, contrary to all the former determinations but the first.||

1785. Two years afterwards, a question arose again as to the right of election:¶ the contest was between the *inhabitants* and the burgage right.—The petition of the *burgesses*

* 32 Journ. 665.

† 1 Doug. 377.

‡ Vide ante, p. 270, et seq.

§ Journ. April 11th, 1783.

|| 1 Lud. 5.

¶ 1 Lud. 3.

stated, that in 1768, the return had been made by the freeholders of *burgage tenure* only, agreeably to the constitution and uninterrupted usage of the borough; but that an attempt was then first made to overthrow that right of election, and to establish it in the *householders, inhabitants, and residents*. Reference was next made to the old entries in the Journals, and to the evidence given upon that occasion. The right being finally settled, as we have seen before, in 1776, to be in the freeholders of burgage tenure paying a burgage rent. It then set out the subsequent claims of the *inhabitants*, which it characterised as an attempt to overturn the ancient constitutions of the borough; and referred to the decision of the House, that no evidence should be given contrary to the determination in 1770.

James I.
Pomfret.

The petition also stated the subsequent proceedings in the borough; and concluded by alleging, that in consequence of the different claims which had been set up by the inhabitant householders and burgage freeholders, two representatives to Parliament of this borough had for some time sat in Parliament, as returned under these two contradictory rights.

Upon the question propounded by the committee, whether the entries in the Journals of 1624 and 1770 were to be read?—it was agreed by the parties that, in order to prevent confusion in the arguments, both those resolutions should be read, without prejudice to the question, and without reading the standing order of 1735; so that the whole case on each side might be considered at once.

In the course of the evidence it appeared that, in 1775, the return of the election which followed the determination of the House in 1624, was not then found in the proper office, and therefore was not produced.

1775.

But it had been since discovered, and was given in evidence before this committee, purporting to be made by the mayor, aldermen, and burgesses. The return upon which this petition was founded stated, the election to have been made by the *inhabitants*, and was the first return in which that term occurred.

Returns.

James I. Upon this it should be observed, that, notwithstanding the
Pomfret. right by the common law was certainly in the inhabitant
householders paying scot and lot—yet the term “*inhabi-*
Inhabitants *tants*” was never used either in the ancient charters, or in
the ancient municipal documents.

Neither in strictness ought it ever to have been used ; for
it was not a term known to the law, with reference to this
subject matter.

But the *free inhabitant householder paying scot and lot* in a
borough, was a *burgess* ; and therefore the term “*burgess*”
is that which always was adopted by the ancient documents,
and ought always to have been continued—particularly with
reference to the parliamentary elections, where the writs
Burgesses. and precepts, and all the earlier statutes connected with that
subject, relate only to the “*burgesses*.”

Inhabitants The gradual introduction of the term “*inhabitants*,” we
have shown in the progressive stages of our history, and
have endeavoured to explain the causes of it. But, never-
theless, it should always be considered as an innovation ; and
it is much calculated to mislead, unless the ancient history
is sedulously kept in mind.

The mayor and town clerk were called as witnesses, for
the purpose of proving the constitution of the borough. But
a moment's reflection is sufficient to show, that it would
be impossible for them to do more than to speak to the
Usages. modern usage in their recollection ; which must have been
long subsequent to the time when the burgage tenure right
had been so strangely adopted by the committees ; and,
consequently, their evidence merely went to their under-
standing of the meaning of the term “*burgess*,” which they
necessarily described as being “*a person possessed of a*
freehold of burgage tenure.”

It was admitted, that none but burgage tenants claimed
to vote at the elections for the year 1768, as far as any living
witnesses could prove. But the committee resolved, that
the resolution of 1624 was a last determination within the
2 Geo. II. 2 George II. ch. 24. sect. 4.

1791. In 1791, Pomfret election again came before a committee ;

the petition stating: *—that it was an ancient borough of ^{James I.} burgage tenure, and an ancient corporation, which consisted ^{Pomfret.} of freeholders of burgage tenure, paying a burgage rent (a description of a corporation which has never been met with before); and it added, that they only were the persons legally entitled to vote;—but that, in violation of that right, the mayor had taken upon himself to reject many persons having freeholds of burgage tenure, and admitting many who claimed to vote as *inhabitants, householders, and residents.*

The former resolutions of 1624 and 1770 were read in evidence, and the contest again in this case was—which of these should be taken to be the last determination within the act of George II.?

The counsel for the *petitioners* seems to have unjustifiably <sup>Petition-
ers.</sup> stated—that Pomfret was mentioned as a borough in Domesday, and that the tenants were there called “burghers;” both of which we have already shown not to be the fact; and reference was made to the charters of Roger de Lasci, constable of Chester, and Lord of Pomfret, and also to Henry ^{Charters.} de Lasci, Earl of Lincoln, which do not materially affect the question as to the class of persons who were the burgesses of Pomfret. If they did, their genuineness might be fairly questioned, as they contain the word “successors,” at a period before that term was introduced into municipal charters in this country. And the committee seem to have doubted their being the original charters; and the counsel for the petitioners appear to have fallen into an error, in supposing that the charters made any distinction between the burgesses and inhabitants—the only two classes mentioned in them being the “burgesses” and the “forinseci.”

The charter of Richard III.† was also referred to; and the returns of members to Parliament were quoted, but, in truth, ^{Returns.} proved nothing satisfactory.

Modern usage was relied upon, and the determination of ^{Usage.} 1624 was termed “an obscure entry upon the Journals, and a conceit adopted by Mr. Glanville’s committee.” The

* 1 Fraser, 183.

† Vide ante, pp. 422, 439, 528.

James I. counsel for the petitioners discussed the whole merits of the Pomfret. case at great length.

Evidence. The above charters were given in evidence, and also those of Henry IV. and James I., as well as the former proceedings in Parliament.

Parol evidence was also adduced for the petitioner, but which, for the reasons given before, could not extend beyond the decisions in favour of the burgage tenants. It was found, that entries in the books of the borough, of 1708, 1713, and 1714, frequently described the scites of the tenements for which the votes were tendered; but this, and the other evidence to the same point, was perfectly consistent with the right of the *inhabitant householders* to vote. The only error, as already pointed out, was considering the "freeholders" as the ~~voters~~ ^{Burgages}, instead of the "occupiers." Evidence was also given, that the *inhabitants* had not made any claim before 1768, and that they never interfered in the election of mayor or other corporate elections; the right of the out-aldermen or non-residents to vote for aldermen, was insisted upon; but it was said they did not join in the choice of a mayor, and that the out-burgesses had voted and carried an election, though their right was denied.

Non-residents.

In summing up, the counsel for the petitioners properly stated, that the effect of the charter of Richard III., was to give to the burgesses the superadded qualification of a corporation; but he, with less accuracy, spoke of the right of the *inhabitants* as a speculative opinion of the common law right. But this sarcasm has been effectually answered, by showing, that the common law right is founded upon the earliest laws and charters, and confirmed by the most ancient documents.

Sitting members.

The counsel for the *sitting members* quoted the authority of Sir Joseph Jekyll, for asserting that "uncertainty in defining the right of election, would be productive of great and general hardship," which would be altogether prevented by the universality and certainty of the right shown to be founded on the common law.

The learned counsel remarked, that London and Carlisle

had both of them numerous burgage possessions; and yet in neither of them does the burgage tenure right prevail. James I.
Pomfret.

He referred to the *Windsor* and *Preston* cases,* and remarked as the fact was, that neither in the charter of Henry IV., Richard III., or James I., is the right of returning members mentioned.

He further justly urged, that the committee ought to have looked with a jealous eye to an usage which must have taken its origin since the reign of James I.; and that there were many instances of returns being made in the names of the *burgesses*, where the right was exercised by the *inhabitants of the borough*.

The other learned counsel for the sitting member rightly observed, that Roger de Lasci granted privileges to his *free burgesses*, as contradistinguished from his *villains*; and he referred to the case of *Ilchester*, which borough petitioned to be restored to the right of election, and it was exercised by the *inhabitants paying scot and lot*. Villain.

The counsel for the petitioners, in *reply*, roundly asserted, that the origin of the right of election in this country, was territorial; this has been negatived by the history of that right, and the documents which have been quoted. And he strenuously argued against the *common law right*, and said that none such was known; but that there was a *lex loci* in every place, which governed the right. The reader will have seen, that also is contradicted by the whole tenor of — this investigation; and no point can be more material, as it is from this erroneous doctrine of the *lex loci*, that all the varying and anomalous *usages* have arisen and been supported; and the great difficulty and intricacy of this national question been produced. Reply.

The counsel also relied much upon the name of the "*burgesses*;" which, it is obvious, is as reconcileable with the right of the "*inhabitants of the borough*," as any others: he appears more correctly to have supposed that some at least of the "*inhabitants*" were contradistinguished from the Burgesses.

* Vide ante.

James I. "burgesses," as villains; for it is clear that only the free
 Pomfret. inhabitants were burgesses, and villains were excluded.

The case was most zealously argued in favour of the bur-
 gage tenure right, and against the inhabitants: but the
 Right. committee negatived the former, and declared the right to be,
 as in the resolution in 1624, in the "*inhabitants householders*
resiants:"—the correspondence of which, with the whole
 tenor of the common law, we have already pointed out.

Thus Pomfret, like Windsor, the history of which has been
 before given, had for a great length of time a different right
 of election existing in it, and confirmed by repeated decisions
 in the House of Commons; but yet, after the most patient
 investigation, and the best assistance of the most able coun-
 sel, a committee under the new judicature, created by the
 Grenville Act, solemnly decided that the *common law right*
 prevailed there, and that the *inhabitants* were entitled to
 vote.

JOURNALS.

Journals Besides the parliamentary decisions we have cited from
 Glanville, there are some few others to be found upon the
 Journals, which it may be necessary to mention. However
 much accurate information is not to be expected in this
 reign, because "the Journals (being for the most part
 "minutes taken by the *clerk*, and not afterwards transcribed)
 "are in many places incorrect and almost illegible, and
 "are also much impaired by length of time and various
 "accidents."

Corpora- In the course of this inquiry, the gradual introduction of
 tions. *corporations* has been marked, as well as their general adop-
 tion in this reign. A confirmation of it is found in the King's
 1603. speech to the House in the first year of his reign,* in which,
 for the first time, the members of Parliament are described
 as burgesses of the towns and *corporations*—neither term
 being warranted, either by the history of our constitution, or
 by the writs or precepts, all of which are confined to the re-
 turns of citizens or burgesses for cities and boroughs; and

* 1 Jour. 146.

this term, "corporation," could not have been adopted had James I. it not been for the recent general introduction of them.

In the second year of James I., upon an inquiry into the election for Cardigan,* the person who was returned is described as *resiant* within the town. 1604. Resiant.

And in the 18th of James I., it was determined, that an election of a knight for the shire,† *not resiant at* the day of the summons, was void in law, and as if there had been no choice. 1620.

And Sir Edward Coke said, that this question was one of the greatest consequence.

SANDWICH.

In a case relative to the election for Sandwich, in the 18th of James I.,‡ it appears that the borough consisted of a mayor, jurats, and commons, and that by an order by Lord Cobham, warden, and confirmed by the lords of the council, the *mayor and jurats only* were to make the election, and the commons were thereupon debarred from giving their voices. The committee decided that the election of the person who was returned by the *mayor and jurats only, without the commons*, was held to be void. 1620.

The right therefore of the select body was in this case expressly negatived.

UNIVERSITY OF OXFORD, &c.

The *University of Oxford*,§ in the beginning of this reign, obtained the only other privilege which was necessary to establish its temporal importance, namely, the right of returning members to Parliament. These institutions being anciently altogether ecclesiastical, the proper place for them to have been represented was in the convocations, and their members ought to have been ecclesiastics; but convocations being in effect annihilated, it was an apparent hardship on the clergy not to be represented at all, and therefore a more liberal interpretation of the *election laws* led to the admission of the *votes of clergymen at county and borough elections*, and also afforded a just claim for allowing representatives in 1603.

* 1 Jour. 170. † 1 Jour. 515, 516. ‡ 1 Jour. 568. § 1 Peck, 48.

James I. Parliament to this learned body. There appears therefore
 University of Oxford. no doubt that the object proposed was justifiable and reasonable; and it has been properly said that the universities, by reason both of the nature and progress of their foundation, had the strongest claims to be represented in Parliament, and the only material question is, whether the mode of doing it was strictly legal.* The grant was not confirmed by Parliament, but was a mere charter of the crown. The most material clause in it, after a long exordium stating the extent, wealth, and antiquity of the university, directs that it shall have "*burgesses*" to Parliament *of themselves*:—which is somewhat anomalous, because, as the *university* was not a *borough*, they could not have, according to the words of this charter, two "*burgesses*" to Parliament. But it is obvious that these words were intended to *assimilate the university*, as much as possible, with the ancient boroughs. The members, in conformity with the ancient writs, were directed to be *from themselves*: and the causes of their being returned to Parliament are said to be, that they might inform the Parliament of the state of their university, and that nothing might be enacted against them without their knowledge. By a clause in the charter, *the sheriff of Oxford* is directed, whenever he receives a writ for the election of members to Parliament, to send his precept to the *chancellors, electors, and scholars of the university* for the election and return of *two burgesses*.

1625. In the 23rd year of this reign, the return for the university was declared to be void; but with that exception their elections have not been in dispute.

This power the university has ever since exercised in the most constitutional and exemplary manner, in one respect effectually putting a stop to those low arts and expedients which are too frequently adopted in elections, by prohibiting the candidate from canvassing, or even approaching the city—an example highly worthy of imitation throughout the country, and probably nothing would tend more to the purity and propriety of elections, if such a course were generally

* 1 Peck, 33.

adopted, or be more in analogy with the ancient principles ^{James I.} of our constitution.

A similar charter was also granted to the *University of Cambridge*, which has in like manner, ever since, returned ^{University of Oxford.} two members to Parliament.

These charters were, in the 14th of James I., brought 1616. before the Court of King's Bench, when their former grants were also referred to,* and likewise the confirmation by act of Parliament, in the 13th of Queen Elizabeth. It was held that the Universities might proceed as they had before.

A *bye-law* of the seventh of James I. is mentioned in the 1609. case of *Dodwell v. the University of Oxford*;† but being subsequent to the statute ~~of incorporation~~ of the 13th of Elizabeth, it was questioned by the court, whether it was warranted by it or not.

Besides the privileges given to the *Universities*, James I., 1605. in the third year of his reign, granted a charter to the city of Oxford, confirming privileges essentially the same as those granted to other boroughs at this period.

CAMBRIDGE.

There is also a charter of the same date, making Cambridge a *free borough*,‡ and the *men* of it *free burgesses*. And granting that the *mayor, bailiffs*, and burgesses should be a body *corporate*, by the name of “the mayor, bailiffs, “and burgesses of the borough of Cambridge;” with power for the mayor, bailiffs, and burgesses, of whom the mayor was to be one, to make bye-laws, so that they were not repugnant to the laws, statutes, customs, or rights of the realm, or the reasonable and laudable prescriptions and customs used in the same borough.

BEWDLEY.

King James I., as Queen Mary had done in the three instances in her reign,§ of *Abingdon*, *Banbury*, and *Higham Ferrers*, granted a charter to *Bewdley*, in the county of Worcester, that it should return one member to Parliament.

* Bulstrode, 212. † 2 Vent. 33. ‡ 1 Lutw. 402. § See before.

James I. It had been previously incorporated in the 12th year of
 1472. Edward IV.,* and additional privileges were granted to it
 1506. in the 22nd of Henry VII. In the first year of Henry VIII.
 1509. there is another charter, confirming the former, and reciting
 them by *inspeximus*.

1605. It was in the third year of this reign that the charter of
 incorporation was granted to it, reciting that it had for some
 time *discontinued* sending members to Parliament—a fact
 somewhat doubtful, as it does not distinctly appear that it
 had ever sent members before to Parliament. It is certain
 that it was not included as a borough in Domesday.†

It is stated by an author who has written on this sub-
 ject, that the charter directed “the *burgesses*, whether in-
 habitants or not, to be the electors.” But no such words
 are to be found in the charter upon the Patent Rolls. It
 gives a power to the bailiff and *burgesses* to elect one mem-
 ber, being a *burgess* of the borough; and the bailiff and
burgesses are to send him to Parliament‡ at their own
 costs and charges, as in other boroughs and corporate
 towns.

The constitution of Bewdley has been since in some degree
 altered, by charters of Charles II., James II., and Queen
 Anne; but in nothing which materially affects the subject of
 our inquiry; and the charter generally resembles the other
 charters we have quoted of those periods.

1662. Shortly after the Restoration, the election of this place
 came before a committee of the House of Commons,§ and like
 Right. the decision in Banbury, the right was held to be confined
 to the *twelve new burgesses*, appointed by the charter of
 James I.

The following is an extract from the Report:—

Report. Serjeant Charlton reported, that the question arose upon
 the words of the charter of the third of James I.,|| which
 mentions the former charter, and incorporates the *burgesses*,
 by the name of “the bailiffs and *burgesses*,” which *burgesses*
 first to be chosen, were confined to the number of twelve,

* Vide ante, p. 1002.

† Vide ante, 211.

‡ Pat. 3 Eliz.

§ See also post.

|| 8 Journ. 414.

and they were empowered to choose other *burgesses*, and ^{James I.} the *burgesses* were to elect and send a burgess to serve in ^{Bewdley.} Parliament.

The question being, whether the *old* burgesses, before the charter of the third of King James, or only the burgesses appointed by it, had voices; they not being *sworn* burgesses of the corporation.

The committee were of opinion, that "the *new* burgesses "appointed by the charter *only*, exclusive of all others," had the right; which resolution the House subsequently affirmed.

The reader will perceive how contrary this resolution is, to that of the committee in the reign of James I.,* in the *Chippenham* case, when it was decided that the charter of the crown could not affect the right of election:—and most justly; because, as we have pointed out before, although the king could create a borough, yet it would be unconstitutional for him to direct that any particular portion of the persons in the borough should vote; for that would give the king the power, indirectly, of controlling the election of members to Parliament.

The sounder doctrine is, that if the king created a borough, all the persons who would be entitled by the common law to vote, should be the persons to exercise that right.

The only mode by which the authority of the case in *Glanville* could be contended to be inapplicable to this, is, that there the borough had before returned members to Parliament; here the right to return a member was given by this charter. Moreover as there were old burgesses, upon the principles we have mentioned above, the right ought to have been exercised by them, and not by those appointed by the crown.

In the 31st of Charles II., the election for this place again ^{1679.} came before a committee, and the right of *all* the *inhabitants* *paying scot and lot* was set up in opposition to that of the *capital burgesses*.

The charter of James I. is stated to have been referred to, and the committee decided, that "*all* the inhabitants had

* See *Glanville*.

James I. "not a right to vote." A resolution in one sense, perfectly
 Bewdley. justifiable; because, as we have frequently had occasion to observe, *all the inhabitants* never were *burgesses*, nor had the right of election,—because villains, infants, ecclesiastics, and the other classes we have enumerated, were always excepted; and none were *burgesses* who were not *householders* paying scot and lot, and had been *sworn* and *enrolled*.

In that sense therefore, the decision was correct. But if it was intended to confine the right solely to the twelve capital burgesses, as the subsequent usage would seem to indicate, then it was not correct, but is subject to the same observations we have before made with respect to Banbury.

1705. The right was *agreed* as above, in the fourth year of Queen Anne.

1708. A petition also, in the seventh year of that Queen, stated the right in the same manner, and complained of a charter then lately granted, which had displaced the former bailiffs and burgesses, on which ground they had refused to accept it; and the committee resolved that an humble address should be presented to her majesty, to give directions to the proper officers, that the several papers relative to that charter might be laid before the House.

The case afterwards proceeded by an inquiry into the rights of two persons who claimed the office of bailiff, involving subtle questions of corporation law. However the sitting member was confirmed in his seat.

1710. In the ninth of Queen Anne, the grant of the new charter was again disputed, and it was alleged that the burgesses had not accepted it.

The papers relative to the charter were again called for, as well as the records of the *quo warranto*; and it was resolved that "*the charter*, dated the 20th of August, 1708," (the seventh of Queen Anne,) *attempted to be imposed on the borough, against the consent of the ancient corporation, was void, illegal, and destructive of the constitution of the Parliament*; and an humble address was directed to be presented to her majesty, that the proper methods might be taken for

1708.
 Charter
 void.

repealing and for quieting the borough in their rights and privileges; which her majesty subsequently directed should be done. James I.

TEWKESBURY.

James I. also granted a charter to *Tewkesbury*,* in the seventh year of his reign, empowering it to return members to Parliament.

It does not appear to have been before represented, though it was undoubtedly a borough by prescription; as we have seen it mentioned in Domesday.†

The earliest charter‡ to it, is said to be from William and Robert, Earls of Gloucester and Hereford, in temp. William Rufus and Henry I., and it grants—That the *burgesses* should hold their *burgages* by free services, viz.—those holding one burgage, should hold it by service of 12*d.* a year, to be paid to the earl, and suit of court, at his three weeks' court: and that on the death of a *burgess*, his heir, of whatever age, should hold free of relief or heriot. Burgages.

That *burgesses* having *burgages* of their own purchase, should sell, mortgage, or exchange at their own will, without any redemption to be made. The *burgesses* to whom the *burgages* were so sold, &c. bringing the charter before the earls' stewards at the borough court.

Those holding half a burgage to have the same privileges as those holding a whole one.

That they might make their testaments of *burgages* of their own purchase at their own will.§

That no *stranger* should be received by the steward within the liberty, unless it was testified that he was *good and true*. Strangers.

That if any stranger should be received, he should find *sureties* of good behaviour to the earl and his bailiffs, and to the commonalty of the borough. Sureties.

That the *burgesses* should be bailiffs or serjeants, when elected at the will of the earl and his steward.

* 2 Lutw. 1735.

† See before, p. 206.

‡ From Mr. Luder's MS. Notes to his Reports in the Inner Temple Library.—App. 25, Note to p. 188. See set forth on Oyer, 2 Lutw. 1332.

§ See Litt. sect. 167; and 2 Bl. Com. 84.

James I. That they should have common of pasture according to their *burgages* as hitherto they had been accustomed.

Tewkesbury.

Assuming that this charter is genuine, the admission of *strangers* is in perfect accordance with the common law, and the practice of the *court leet*, as we have shown it to be exercised in other places.

Even if the charter is not genuine, it is at least proof of what the usages were at the time it was framed. It seems 1341. to have been exemplified in the 15th of Edward III.

Queen Elizabeth, in the 17th year of her reign, also granted a charter to Tewkesbury,* reciting that the *burgesses* and *inhabitants* had enjoyed many liberties, as well by prescription, as by letters patent of King Edward III.; and a charter of Gilbert de Clare, sometime Earl of Gloucester and Hereford, in the time of Edward II., to the *burgesses* and *inhabitants*; which letters patent had been frequently confirmed by the queen's progenitors.

The queen further recited,—that the town was in two manors, and that inconveniences arose therefrom; to remedy which, upon the supplication of the *burgesses* and *inhabitants*, and at the request of the Earl of Leicester, the high steward of the borough, her majesty granted that the town of *Tewkesbury*, and the abbey fee, and the manor and liberties parcel of the monastery, should be a free borough *incorporated*—and that they should enjoy all the liberties which the bailiffs, *burgesses*, or *inhabitants* theretofore had enjoyed.

Members. There were three charters of James I.—one in the third, and two in the seventh year of his reign; in the last of which, the clause for the election of members to Parliament gives the power of electing to “the bailiffs, *burgesses*, and commonalty;” and, in the manner we have seen in other charters of the same date, authority to elect so many *Burgesses*. and such persons *inhabiting* and *commorant*, as well within the borough as without, to be *burgesses*, as they should think fit for the public good.

This clause might appear to authorize the admission of

* 1 Peck, 147.

non-resident burgesses, which would be giving it a construction militating against the whole common law, and the system of municipal government which we have explained.

James I.
Tewkesbury.
Non-residents.

On the other hand, it is capable of a construction, that they had the power given to them of receiving as burgesses within their borough, persons who had before resided out of it,* as well as those who had dwelt within it,—which is a construction in accordance with the principles of our law, and the history of boroughs.

However, it appears, that at the time of the Revolution, *non-residents* were allowed in the borough.

In the second year of James II., the burgesses made a surrender of their liberties to the king,† which was recorded in the Court of Chancery.

1686.
1688.

This place, however, was one of the boroughs mentioned in the proclamation of James II.—and obtained a grant of a new charter in the eighth year of William III.

1696.
Charter.

It appears from the draft of the new charter, as settled and signed by Mr. Attorney-general Ward, that he struck out the following words:—"By which same surrender, the "aforesaid charters of James I., and all things in the same "contained, are become void and determined:"—apparently thinking that the former charters were not defeated by that surrender.

The *returns* for the borough, from the period of its first sending members to Parliament, were generally by the *burgesses* only, and in one instance by the *burgesses and commonalty*. But the return to the Prince of Orange's letter was made by 40 persons, described as "*burgesses* and "*freemen*—being such persons as, according to the ancient "laws and customs, of right ought to choose members to "Parliament."

Returns.

After which time, there was also a return by the *burgesses, freemen and commonalty*.

In the books of the corporation, there was an entry in the 27th of Elizabeth, of a person being "*discommoned*" out of the freedom of the town.

1584.

* See post., the Ipswich case.

† 2 Lutw. 1335.

James I. Upon an inquiry into the merits of an election from this
 Tewkes- place, in the 37th of George III., under the Grenville Act,
 bury. the *petitioners* delivered a *statement*, declaring the right to
 1797. be "in the bailiff, burgesses, and commonalty—meaning
 "by the word 'burgesses,' such persons as were entitled
 "to their freedom by servitude or copy; and by the word
 "'commonalty,' the *inhabitants householders*" — introducing a strange distinction between the burgesses and commonalty.

On the other hand, the *sitting members* stated, that the right was "in the freemen, and in any person seised of an estate in freehold, in an entire dwelling house, situate within the borough:"—a strange division of the burgesses into two classes—inconsistent according to the modern notions—one meaning, as it would appear, the freemen of the corporation—the other descriptive of a species of burgage

Right. tenure right.

The committee resolved, that the right was "*in the freemen at large, and in all persons seised of an estate in freehold, in an entire dwelling house within the ancient limits of the borough.*"

Burgess. In the course of the inquiry, this still more anomalous description of a *burgess* was given in the parol evidence; that "it was understood, in Tewkesbury, that '*burgesses*' meant "*freeholders* of an entire freehold house—that the freeholders were not considered as part of the corporation, but
 Freemen. "that they had a right of common in respect of their freehold house;—that the *freemen* were exempt from tolls to which "the freeholders and inhabitants who were not freemen "were liable—and that the inhabitants did not enjoy any "corporate right whatsoever."

Thus the burgesses having been, by successive kings from the reign of Edward VI. incorporated, and James I. having given them the power of election, that right was, according to the evidence, to be exercised by *freeholders*, who
 Inhabitants were not members of the corporation—and the *inhabitants* who were expressly mentioned in the charter of Queen Elizabeth —were not to enjoy the privileges of the corporation;

but the "*freemen*" were to do so, who were not mentioned in any of the charters. James I.

Tewkesbury.

In such intricacies will these questions naturally be involved, when the simple principles of our constitution are once forsaken ; and in this instance, a great portion of these anomalous doctrines are to be attributed to the too hasty adoption of loose evidence of "*usage*," which alone could have produced the strange decision we have stated above. Usage.

TIVERTON.

Tiverton was another borough which James I. empowered to send members to Parliament, in the 13th year of his reign. 1615.

It is not mentioned as a borough in Domesday, nor is there any trace of it as such until the charter of James I., in which it is recited that it had been lately burnt.

There are likewise no traces of any parliamentary inquiry as to the class of persons who were the *burgesses* of this place, but the right of election was exercised by the *select body* of the corporation. Select body.

Tiverton has, however, been before the Court of King's Bench, with reference to its municipal rights.

In the 11th of George I., the mayor of the borough having absented himself on the charter day from the election of his successor, no new mayor could be chosen. And there being no power for the mayor to hold over, the corporation became dissolved. 1723.

The following year, an application was made to the crown for a *new charter*, which was referred to the attorney and solicitor-general, who inquired into all the facts connected with the case, and a charter was granted in the 11th year, reciting, that it was a very ancient and populous town ; and in the woollen manufacture not inferior to any town within the western parts of England, whereby many poor and indigent persons, *inhabiting* in those parts, supported and maintained themselves, &c. And that the *inhabitants* of the town had done divers good services to the king and his predecessors. That the *inhabitants* had, in the 13th year of James I., New Charter. 1724. Inhabitants

James I. been incorporated by the name of "the mayor and burgesses
Tiverton. of the town and parish of Tiverton, in the county of Devon."

That they petitioned "that the king would by his letters
 "patent, restore, constitute, confirm, and of new create the
 "*inhabitants* of the town and parish into one body corporate
 "and politic; and grant and restore to the *inhabitants* of
 "the town and parish, all the powers, &c. which were granted
 "by King James I., together with such other liberties as
 "should seem most expedient."

The king accordingly granted that Tiverton should for
 ever be a free town, and the *inhabitants* and their successors
 one body corporate—and by the name of "the mayor and
 burgesses," have perpetual succession, &c.

That there should for ever be within the town one of the
 most discreet and honest who should be called the mayor—
 twelve of the most discreet and honest *inhabitants* who
 should be named capital burgesses—twelve other of the dis-
 creetest and honestest *inhabitants* who should be named as-
 sistants of the town; and that the burgesses and assistants
Common should be the common council: to whom powers are given
council. to make ordinances.

The mayor, eight capital burgesses, and eleven assistants,
 all described as *inhabitants*, are then named and appointed
 to their respective offices.

It is then provided, that previous to the first of February
 next ensuing, the mayor, capital burgesses, and assistants,
 should assemble, and elect four persons of the assistants to
Capital be capital burgesses; and that they should supply the vacan-
burgesses. cies of the assistants, to the number of 12, from the *inha-*
bitants of the town.

That when a capital burgess died, removed, or *departed*
 from his office, the common council should supply the vacan-
 cy from the assistants.

That when any assistant died, removed, or *departed* from
 his office, the common council should supply the vacancy
Inhabitants from the most discreet and honest inhabitants of the town.

A recorder, deputy recorder, and clerk of the peace are
 then granted, &c.

The mayor for the time being, and for one year after he should depart from office, and the recorder, were to be justices of the peace, &c. And no justice of the peace, within the county, should in anywise intromit within the town, excepting in things touching the king's revenue. James I.
Tiverton.

A sessions, with powers as justices of the peace—a gaol—a court of record, of pleas not exceeding 300*l.*, are also granted. And all charters, liberties, &c., previously enjoyed, are restored and confirmed.

We have before seen, that in the charter of James I. to Tiverton, there was a clause giving the right of returning members to Parliament, as was supposed, to the *select body* of the corporation. But, when the last charter was granted by George I., in other respects resembling that of James I., that clause was excluded. And as the select body had claimed that right solely under that charter, the acceptance of the new grant being a surrender of the former, would seem to put an end to their right. Nevertheless they continued to exercise it till the passing of the Reform Act.

ST. EDMUND'S BURY.

St. Edmund's Bury is another borough which was called upon in the fourth year of James I., to return members to Parliament. It is not mentioned as a borough in Domesday, nor is there any reason for thinking that it was a borough by prescription. 1606.

The being ecclesiastical property probably explains why both this place and Evesham, were not made boroughs at an earlier period.

We have already seen, in the reign of Edward IV.,* that it was not a *corporation* by prescription.

There seems to be some doubt whether it ever before returned members to Parliament. Prynne alleges that it did in the 30th of Edward I., but it is questionable. 1300.

The inquiries into the parliamentary right of election have not been numerous.

* See before, 1003.

James I.

St. Ed-
mund's
Bury.

1714.

In the first of George I. the *sitting members* were elected by the *select number* of the supposed corporation: the *petitioners* by the "populace."

For the petitioners it was untruly alleged, that St. Edmund's Bury was a borough and corporation by prescription, and that the right of election was in the alderman and burgesses *resident in the borough paying scot and lot*. This was denied by the sitting member, who contended that the right was in the alderman, 12 capital burgesses, and 24 burgesses of the common council, to whom the privilege was originally granted by the charter of the 12th of James I., before which time it was alleged that the borough had never sent members to Parliament.

For the *petitioners*, evidence was given of a writ of the first of Richard II., directed to the alderman, commanding him to make a levy upon the *inhabitants* for repairing the guildhall.

In the 30th of Edward I., the sheriff returned that the steward of the liberty of St. Edmund's had sent him no answer. Reliance was had before the committee upon proceedings against the "men" of the town, in which the "successors" were mentioned, which was alleged to be evidence of their being a "community" and a "corporation," and that they had a prescriptive right to send members to Parliament:—which was, for the reasons we have given before, untrue.

Reliance was placed upon the head of the town being styled "*alderman*:" and it was said,* that every town in England whose head or chief officer was so named was founded by the Saxons.

And they insisted upon the determination in the 12th of Charles II., as showing that the members chosen by the *select body* were allowed to sit. Those being returned by the *inhabitants*, being taken off the file.

It appeared in evidence, that there was a *court leet* within the borough, and the antiquity of the town was maintained.

The committee resolved, the right was "in the alderman,

* See before, pp. 16 to 20, 53, 194, 298.

"12 capital burgesses, and 24 burgesses of the common James I.
"council."

ILCHESTER.

The shire town of Ilchester was also another place called upon to return members to Parliament in the 19th year of 1621.
James I.

The borough and its burgesses are mentioned in Domesday.*

It is also said, that there was a charter to this place† in the reign of Henry II., found by an inquisition in the reign of King John.

It returned members to Parliament from the 26th of Edward I. to the 34th of Edward III., after which it only returned in the reign of Edward IV., and then intermitted till the period we have mentioned above. Returns.

Henry V. is stated to have granted it a charter, and there are old inquisitions, which speak of the halls of the town.

Queen Mary also granted a charter in the third and fourth years of her reign, incorporating the borough, but not mentioning the return of members to Parliament.

And in the 25th year of Queen Elizabeth, there is a rental enrolled in the Exchequer, which shows the number of houses existing at that time.

There has ever been a *court leet* held in the borough.‡

In the second year of William III., the election of this 1689.
place came before a committee of the House of Commons, when the petitioners contended that the right of election was in the *inhabitants paying scot and lot*, called *potwallers*. Potwallers

Evidence was adduced that some were *boarders*, and not possessed of any house so as to be called *potwallers*.

In this instance, therefore, contrary to those of Taunton, Honiton, and Tregony, the *potwallers* appear to have been considered as *householders*.

In 1702, the right of election was *agreed* to be in the 1702.
bailiff, capital burgesses, and *inhabitants*.

* See before, p. 163.

‡ 2 B. and C. 164.

† See before, p. 411.

James I. In inquiries in the 15th and 25th of George III., it
 Ilchester. appears to have been agreed, upon both sides, to have been
 1775. the *usage* of the borough that the *inhabitants* should be *house-*
holders,* having a legal settlement:† so that in truth the *bur-*
gesses of Ilchester were considered to be, in substance, that
 class of persons which the common law required.

It should be observed, that in some of these places which were called to return members to Parliament by James I., particularly Tewkesbury and Ilchester, they had not only been previously boroughs, but also incorporated long before they were called upon to send representatives to Parliament. So that, as we have seen, places not incorporated returned members to Parliament, here there are instances of places incorporated not returning. It may, therefore, certainly be concluded that the right of parliamentary election is not a corporate right.

EVESHAM.

The ancient town of *Evesham* was also called upon to return members to Parliament in the first year of James I. at which time, and in the third year of that reign, it received charters of incorporation.

We have already seen, that this place was ecclesiastical property,‡ and was not mentioned in Domesday as a borough, But its *burgages* occur as early as the reign of Edward I.;§ and it is said to have returned members to Parliament in the 23rd year of that reign.

It also received charters in the reigns of Edward III. and Henry IV;|| and the court-leet we have seen mentioned as early as the reign of Edward IV., and again in the reign of Queen Elizabeth.¶

1604. It is said, in the printed report of the Evesham election case, that the first return for this place now to be found, is of the 2nd of March, in the first year of James I., the same day on which the charter is dated. The Parliament, how-

* 3 Doug. 153.

† 1 Lud. 464.

‡ See before, p. 211.

§ Litt. 651 and 791.

|| See before, p. 526.

¶ See before, p. 1004.

ever, did not sit till the 19th of March; but it will be seen James I. by reference to the return, that in point of fact it was made Evesham. on the 15th of April.

At the time of the hearing of the petition, before the election committee in 1808, the strictest search was made to discover, if possible, an earlier return for this place, but none was found. Mr. Willis speaks of one as early as the reign of Edward I.: but as most of the returns are extant in that reign of those places which then sent members, it seems improbable that Evesham should have done so at that time.✕

A more minute investigation of the charters of James I. is not here necessary. We therefore now close the history of this reign relative to England.

IRELAND.

As Queen Elizabeth had made considerable advances towards the actual subjugation of Ireland—so, to the praise of James I., it should be recorded—that he essayed the nobler work of civilizing its inhabitants, and obtaining a real influence over it by the effect of good laws, well administered—and the introduction of habits of industry and good order. This purpose, it is said, he pursued by a steady, regular, and well-concerted plan; and Sir John Davis affirms, that he made greater advances towards the reformation of that kingdom, than had been effected by all his predecessors, from the earliest period of its original conquest.

For this purpose the Brehon laws were abolished, as well as the customs of gavelkind and *tanistry*, by judgment in the King's Bench: and the Irish estates, were made descendible according to the course of the common law. After thus clearing the ground for the introduction of the English customs and manners, the king used his best efforts to effect the substitution, by placing the country under a regular administration both civil and military—and declaring all the *inhabitants* to be *free citizens*, and under his protection.

A general indemnity was granted—circuits established—justice administered—crimes punished—and, above all,

Mr. Check of Evesham 14 March 1835. communicated "that Evesham actually made a return under summons to Parliament for the County of Gloucester, 3^d October 23^d Edward 1st when Wm de Lodinton and de Hales, were returned, and that a copy is preserved in the Temple Library Collect. Gul. Pet. tom 15 fo: 97"

James I. means were taken to compel the people, according to the ancient English law, *to have fixed habitations: and permanent residence was secured in the towns.**

But few human endeavours are without some mixture of evil. King James, finding that his plans of improvement did not have their effect so extensively as he desired—and that he was not supported by the Irish Parliament, was compelled to resort to means for the management of that turbulent body which were far from justifiable, and too much resembled the course which Queen Elizabeth had taken for the same purpose in England.

Under-takers. The English “Undertakers” were confirmed in their possessions—a measure in itself strong enough, but it was followed by others of a still more decisive nature. London embarked in the undertaking—the king saying, that “when his enemies should hear that London had a footing therein, they would be terrified from looking into Ireland, the back-door to England and Scotland.”

But even these circumstances were not sufficient to effect the purpose of the king; and he was compelled to displace from the ancient boroughs many who were opposed to his wishes—and, as a still stronger measure, to create many *new boroughs and corporations*, with the hope of increasing his influence. As a similar course met with opposition in England, so did this in Ireland;—and we find as early as 1612. in the 10th year of this reign, a letter sent to his majesty from six of the lords of the Pale, stating—that “his majesty’s subjects in Ireland, in general, did very much distaste and exclaim against the deposing of so many magistrates in the cities and boroughs of the kingdom.” And they humbly prayed his majesty, that “he would be graciously pleased not to give way to courses, in the general opinion of his subjects, so hard and exorbitant, as to erect towns and *corporations* of places consisting of some few and beggarly cottages; but that his highness would give directions that there should be no more erected till timely traffick and commerce made places in the remote and unsettled country

* Kennet.

"fit to be incorporated;—and that his majesty would benignly James I.
 "content himself with the service of understanding men, to
 "come as knights of the shire out of the chief counties to
 "the Parliament. And to remove the fears and discontents,
 "that the king would be graciously pleased to order, that
 "the proceedings of that Parliament might be with the
 "same moderation and indifference as the king's predeces-
 "sors had used theretofore."

This address the king pronounced "rash and insolent."*
 And the new boroughs were increased to the number of 40,†
 of which, however, some were not incorporated until the
 writs for summoning Parliament had already issued.

Urgent, no doubt, were the reasons which tempted King
 James to this extravagant line of conduct—and perhaps the
 plea of "necessity" might be urged to justify the use of
 these means, when the king was opposed by the violence of
 religious animosity;—but still the truth of history requires
 that they should be characterised as *unconstitutional*; and
 what is more material to the subject of our inquiry—what-
 ever their cause or occasion might have been—the facts are
 necessary to be here recorded, as some of the circumstances
 which favoured the usurpations and innovations were com-
 menced by Elizabeth—continued by James—and from him
 handed down even to our own times. A plausible pretext was
 suggested for these measures, in a letter from Sir Christopher
 Plunket to his son, by asserting their object to be, that "as 1612.
 "the kingdom was wholly reduced to a shire ground, all the
 "*inhabitants* of the kingdom—Irish of birth—English of
 "blood—and even British colonists, and the old Irish na-
 "tives, were all to meet together to make laws for the com-
 "mon good of themselves and their posterity." It was

* The example of the king was followed by the lord deputy; for Lord Mountjoy, having occasion to visit Waterford, the citizens offered to receive him within the walls, but refused his army admittance, in consequence of the privileges contained in the charter which they had received from King John. His lordship observed, "That with King James' sword he would ruin their city, and strew it with salt."—Smith's Hist. of Waterford, p. 144.

† It is said that King James, in the Parliament of 1613, acquired 80 additional votes by the boroughs he created, and the charters which he granted.

James I. said, that Queen Elizabeth had made many counties: and it was triumphantly asked,—“Why should all your old shires have cities and boroughs in them, and these new counties be without them? Or, should Queen Elizabeth be able to make a county, and not King James a borough?”

However, notwithstanding all these golden prospects and plausible reasonings, it seems that after these new creations, every art—and promise—threat—and alarm—were employed to gain them who could be of service in the elections. These attempts produced scenes of riot and conflict between the contending parties—the necessary consequence of such proceedings, whether adopted for a good or a bad purpose.

The course of the elections produced violence in the deliberations of the Commons, and even without the doors of Parliament. A disgraceful struggle occurred in the House for the possession of the chair, and remonstrances were made, calling for the grants and charters of the new corporations, and that their returns should be investigated.

Lords of
the Pale.

A petition was presented by some of the lords of the Pale, to the privy council, in which they say,*—“In declaration of the naked truth, your lordships shall understand, that we, the knights, citizens, and burgesses of the counties, cities, and ancient boroughs of this realm, coming according to our bounden duties into the Parliament House, we find there fourteen counsellors of state, three of the judges having before received writs to appear in the higher House, all his majesty’s counsel at law, and the rest of the number for the most part consisting of attornies, clerks in courts, of the lord deputy’s retinue, and others his household servants, with some lately come out of England, having no *abiding* here; and all these, save very

New corporations.

“few, were returned from the *new corporations* erected, to the number of forty or thereabouts, not only in places of the new plantation, but also in other provinces, where there be corporations of antiquity; few or none of them having ever been *resident*, and most of them having never seen these places; the rest, who possessed the room of

* Desid. Cur. Hib. pp. 202, 203.

James I.

"knights of shires, save four or six, came in by practice
 "and dishonest devices, whereunto themselves were not
 "strangers; and some there were from ancient boroughs,
 "who intruded themselves into their places by as undue and
 "unlawful means; as the knights and burgesses duly elected,
 "were ready at the Parliament door to prove and avouch; for
 "redress whereof, we of the ancient shires, cities, and towns,
 "to whom no exceptions could be taken, are desirous to
 "take the usual and accustomed course. What outrageous
 "violence ensued by the fury of some there, we humbly leave
 "to your lordships to be informed by our declarations, where-
 "unto a schedule, by direction of my lord deputy, subscribed
 "with our hands, is annexed. And forasmuch, right honour-
 "able, the strangeness is such as we cannot think his majesty
 "and your lordships will hardly be induced to believe, they
 "being in the likelihood of impossibility."

There was also another petition from some of the temporal lords, the knights, citizens, and burgesses of some of the counties, cities, and ancient boroughs,* which stated,—“that they were faithful and obedient subjects. The greatest number of the temporal lords, together with the knights, citizens, and burgesses of the counties, cities, and ancient boroughs underwritten, assembled to the Parliament, do in most humble and submissive manner, by our agents above named, offer to your highness's most deep consideration this annexed schedule, containing some particulars of miscarriages and abuses in the election of knights, citizens and burgesses of several cities, counties, and boroughs, and the corrupt and false returns of divers sheriffs and officers to the Parliament, whereof we formerly complained in general terms, according as the same hath been complained upon, and delivered unto us from the *inhabitants* of those places. By which indirect proceedings (it being *a matter very dangerous, that the sheriffs should, at their pleasure, make the lower House of Parliament to consist of what persons they pleased to return*),† and by means of other

* Desid. Cur. Hib. pp. 212, 213.

† Vid. post., temp. Will. III.—Brady's History of Boroughs.

James I. "strange and unwarranted courses, now also held in the
 "Parliament, which your suppliants are ready to lay open
 "upon the further hearing of this cause."

And they further state, that "by the statutes, the knights
 "ought to be of the *nativity* of the country, which have been
 "infringed, as stated in the petitions of the *inhabitants* of
 "several of the counties, complaining that the persons who
 "had been returned had *no residence* there."

And in another statement of the miscarriages, errors, and
 abuses in Parliament, complaint was made to the king, "that
 "Ireland was divided with thirty-two shires, seven cities,
 "and very many ancient boroughs, of which ancient bo-
 "roughs there were not warned to this Parliament,* through-
 "out the whole kingdom, above the number of thirty or
 "thereabouts, which, as it appeareth, was done of purpose,
 "and not of negligence, in that divers of the sheriffs of
 "Meath and Kildare, being desired to send precepts to
 "divers ancient boroughs in their counties, refused so to
 "do, alleging they had special directions to do the con-
 "trary. Some sheriffs, likewise—as namely, the sheriffs of
 "the county of Wexford and Westmeath, having formerly
 "sent warrants to divers ancient boroughs in those coun-
 "ties, and *burgesses* being chosen upon those warrants,
 "the sheriffs refused notwithstanding, to accept the returns
 "of the officers of those boroughs, and so none appeared
 "for them in this Parliament.

New cor-
 porations. "Of the other side, there appeared in this Parliament for
 "new *corporations*, never before heard of by us, to the num-
 "ber of four score persons or more, of whom very few were
 "natives of the country, but for the most, captains, lieute-
 "nants, and commanders of soldiers, which did daily oppress
 "the poor country; many clerks, attornies, and officers of
 "courts and places, who with excessive fees continually
 "extorted upon the subject; divers servants to great men,
 "and others that made their benefit by following intrusions
 "and concealments to the great impoverishment of the an-
 "cient gentlemen and freeholders; so as these being the

* Desid. Cur. Hib. pp. 219, 220.

"greatest enormities and grievances in that poor common-
 "wealth, the *inhabitants*, (who expected redress thereof by
 "laws to be enacted in that Parliament) *seeing so many in*
 "*number of that sort of people, as these that joined with them*
 "*were able to oversway the whole House by the multitude of*
 "*their voices*, were in despair of any good remedy to be
 "provided by their means, for those things which they most
 "desired.

James I.

"Few or none of these had their *residence* (as by law they
 "ought to have) or being in those places for which they ap-
 "peared, many of them having never seen them, and some of
 "them scarcely knowing the names of those places; yea,
 "some of them being but lately come into that kingdom, had
 "no determination of *abode* there, to make themselves or
 "their posterities liable to those laws they would there
 "enact.

Residence

"These new erected *corporations* also, for the most part, are
 "beggary and poor, being neither *inhabited* nor able to send
 "burgesses of their own, or go upon their own charges to
 "Parliament; and whereas in the ancient boroughs there be
 "divers freeholders holding by *burgage tenure*, so as the
 "*inhabitants* are not immediate dependents altogether upon
 "one man, it is otherwise now in these *new corporations*, for
 "that *the freeholders of each of them, for the most part, is*
 "*altogether in one man*; so as he being able to command
 "his tenants at will, or for years, may have by their means
 "the nomination of those who are to give voice in Parlia-
 "ment where the *inhabitants* of a whole county can have
 "no more.

"We conceive, if it may please your highness, that your
 "gracious intention and direction for granting a liberty to
 "those new corporations, that they should have voice in Par-
 "liament, was upon suggestion made, and argument urged
 "that it were hard to bind those people by new laws or
 "statutes, who had no means to give or deny their consents in
 "enacting of them: but that suggestion was not altogether
 "true, for they being within the counties and shire-ground (as
 "all the kingdom of Ireland is) they had voice by two knights

James I. " of every one of the shires wherein these corporations are
 " erected, which might as well satisfy them, as Wales is supplied by one knight, and one burgess only for every shire.
 " And whereas in some of those counties there are now
 " erected six *new corporations* in many several shires of this
 " your highness's kingdom of England, (being far better
 " peopled and stored with towns and habitations, than there
 " is likelihood the other will be for many years yet to come,)
 " there is but one borough alone that sends burgesses to the
 " Parliament; yea, in Rutlandshire, there is not one city or
 " borough that hath voice in Parliament, yet those in Ireland
 " are not satisfied with a convenient number or proportion,
 " (as doubtless your highness's intention was they should be),
 " but have made up so many as they do seek to prescribe
 " laws thereby to the whole kingdom besides: and many
 " of these new erected corporations are in shires and counties,
 " where there were before sufficient number of cities and
 " ancient boroughs.

"There are also *new charters* sent to some ancient boroughs,
 " without the request of the great number of the *inhabitants*,
 " and of these charters some few, as to the number of 12 or
 " thereabouts, are only selected, and enabled to send burgesses for the Parliament,* *excluding thereby the residue of*
 " *the inhabitants*, who, by the *laws and statutes of the kingdom*, ought to have voice in the election. And upon some
 " of these new charters, this *selected number do choose two of*
 " *themselves for burgesses*, contrary, as we conceive, to the
 " very charters, whereby it is limited that the 12 burgesses
 " shall concur in the election of burgesses."

There are many other complaints, which it would be too tedious to mention, excepting that it is further added, that the king had directed by his commission, that the lords spiritual and temporal, and the knights, citizens, and burgesses of cities and boroughs, and others whatsoever of the kingdom which had *used* to come to the Parliament, should be summoned according to the custom theretofore used; and therefore the authority being restrained to the ancient

* See the Dungannon case, Co. Rep.

usage must be strictly pursued; and so there was no warrant or ground to assemble burgesses out of any other but the *ancient corporations*. James I.
Ancient corporations.

Also, in the counties of Armagh and Cavan, the sheriffs returned four persons who had *no residence* in their counties, although four others were elected who had.* Non-residents.

In the 11th year of James I. another remonstrance was also issued, which recited that the king,† by sinister and undue course of information, had been induced to give way to the erection of sundry *corporations* within the realm of Ireland, as well in counties where there were no boroughs, as in others well stored of them; inasmuch as the agents from that kingdom are ready to make proof of the poverty of most of those places, and to give his majesty other good satisfaction, why those corporations should not be multiplied into so great a number, that the same course may be taken for the counties newly made, which have no *ancient boroughs*, as was taken for giving of liberty to Wales, in sending knights and burgesses to the Parliament in England; that is, to give liberty by Parliament for one borough in every such county to send burgesses to the Parliament, which, besides the knights for that shire, may suffice, considering that in England itself there be divers shires that have but one burgess to give voice in Parliament; and the *habitation* of that part of Ireland is not comparable to either Wales or England, and hardly can any place be found in those counties, fit to be endowed with such liberties. New corporations.
Wales.

It appears also, that many persons whose *turn* it was (for that seems to have been the term adopted in Ireland, according to the strict rule of the old law in England,) to be mayors, were excluded. Turn.

It was after all these complaints that the king, in the 12th year of his reign, delivered a speech in the council chamber at Whitehall,‡ in the course of which he said, "As to the complaint of the *new boroughs*, therein I would fain feel their pulse, for yet I find not where the shoe wrings." 1614.
New boroughs.

* Desid. Cur. Hib. p. 215.

† Desid. Cur. Hib. p. 228, 229.

‡ Desid. Cur. Hib. p. 308, 309.

James I. "For first, *they question my power, whether I could lawfully*
 1614. "*make them*; and then the wisdom of myself and my council,
 "in that they say there are *too many made*. It was never be-
 "fore heard, that any good subjects did dispute the king's
 "power in this point. *What is it to you, whether I make*
 "*many or few boroughs*! My council may consider the fit-
 "ness, if I require it. But *what if I had created forty noble-*
 "*men, and four hundred boroughs*! '*The more the merrier,*
 "*the fewer the better cheer.*'

"But this complaint, as you made it, was preposterous; for
 "in contending for a committee before they agreed of a
 "speaker, you did put the plow before the horse, so as it
 "went untowardly, like your Irish plows. But because the
 "eye of the master doth make the horse fat, I have used
 "mine own eyes in taking a view of those boroughs, and
 "have seen a list of them all. God is my judge, I find the
 "*new boroughs, except one or two, to be as good as many of the*
 "*old boroughs*, comparing Irish boroughs new, with Irish
 "boroughs old; for I will not speak of the boroughs of
 "other countries; and yet, besides the necessity of making
 "them, I find them likely to increase, and grow better daily.
 "I find, besides, but few erected in each county, and in many
 "counties but one borough only, and those erected in fit and
 "convenient places, near forts or passages, for the safety of
 "the country. Methinks you that seek the good of the
 "kingdom should be glad of it. *I caused London also to erect*
 "*boroughs there*, which when they are thoroughly planted,
 "will be a great security for that part of the kingdom;
 "therefore you quarrel at that which may bring peace to the
 "country.

"*For the persons returned out of those boroughs, you com-*
 Residence "*plain they have no residence*. If you said they had no
 "interest, it had been somewhat; but most of them have
 "interest in the kingdom; et qui habent intercessare, like
 "to be as careful as you for the weal thereof. I seek not
 "emendicata suffragia. *Such boroughs as have been made*
 "*since the summons, are wiped away at one word for this time.*
 "I have tried that and done you fair play. But you that are

"of a contrary religion must not look to be the only law- James I.
 "makers; you that are but half subjects should have but half 1614.
 "privileges; you have but one eye to me one way, and one
 "to the pope another way; the pope is your father in spirit-
 "ualibus, and I in temporalibus only; and your bodies are
 "turned one way, and your souls drawn another.

"You that send your children to the seminaries of treason,
 "strive henceforth to become good subjects, that you may
 "have cor unum et viam unam, and then I shall respect you
 "all alike. But your Irish priests teach you such grounds
"of doctrine, as you cannot follow them with a safe con-
"science, but you must cast off your loyalty to the king."

At length the king directed the House to be informed, that he desired they should take example from his forbearance, and not call in question any former contempt or misdemeanour: to the end that all the members of the House might be reunited in concord and amity; and that particular expostulation might not give impediment to the general business.

After which follows a statement of the real grounds and manner in which these strong measures were attempted to be justified,* and eventually acceded to—and that in consequence of the members who departed from the rest, having acknowledged the king's lawful power and prerogative to incorporate, as well as to enable the same to send burgesses to Parliament, he had thought it fit and convenient that the *burgesses returned from eight boroughs*, which were erected by charters there *since the writs of summons to Parliament* went forth, viz., from the boroughs of *Tallagh, Lismore, Catherlogh, Clonkiltie, Featherd, Agher, Belfast, and Charlemont*, should forbear to sit in the House of Commons during that Parliament only.

Eight
boroughs.

And that the burgesses returned from the boroughs of *Kildare and Cavan*, having been found by the certificate of the commissioners to be falsely returned, do likewise forbear to sit in the House, unless they be again duly elected. That

* Desid. Cur. Hib. p. 324, 325.

after

James I. the certificate of the clerk of the office of the rolls being,
1614. That the towns and boroughs of *Clogher, Alone, and Garocan*,
Three boroughs. have no lawful power, by charter or prescription, to send
burgesses to Parliament, the burgesses for those three towns
should also forbear to sit in Parliament; but that all the
rest of the burgesses should be admitted to sit as lawful
members.

1613. In answer to the commission which was issued by the
king, in the 11th year of his reign, as to the returns concern-
ing the matters of Parliament; amongst other things, the
proceedings at the elections for some of the boroughs were
mentioned.

Trim. As to the town of *Trim*, the election was stated to be at an
assembly of the *townsmen*, before the *portreeve*, and the ser-
jeants were commanded to warn all the *inhabitants*—and the
members are stated to have been elected by the *burgesses and*
inhabitants.

Wicklow. As to the town of *Wicklow* it is stated, that at an assem-
bly of the *inhabitants*, which the *portreeve* had summoned
for no other purpose than to keep a court baron; they were
moved to proceed with the election of burgesses to Parlia-
ment, but the *portreeve* was objected to—because the town
being no corporation before, nor enabled to send burgesses
to Parliament—and having been *newly incorporated some few*
days before the writ was sent to the sheriff, another person
was appointed *portreeve* by his *majesty*.

Cavan. In *Cavan*, the assembly for the election was stated to be
by the sovereign and *inhabitants*—and a second meeting be-
ing held for the same purpose, the *inhabitants* also then
attended.

Charters. The complaint against many of the new corporations was,
that their charters bore date some time AFTER the date of
the commission for holding the Parliament, and some AFTER
the summons.

Dublin. As to *Dublin*, it appeared that at this election much tumult
arose between the *freemen* of the city and the *inhabitants*.

1614. In the 12th of James I., it seems, that at the Parliament,
one of the members argued, that those persons returned for

the boroughs newly elected—and such as were *not resident and dwelling in the boroughs for which they were returned, were not members of the House.* James I.

By this resistance, so long continued against the measures of the king, he seems at last to have been driven to desperate extremities; and in the 14th year of his reign, we find 1616. him directly requiring the destruction of the boroughs which opposed his views; and, like his predecessors, he discovered that their increase, though made with the view of supporting his influence, had, in fact, the direct contrary effect. New boroughs.

Thus, in an order of this date,* to the lord deputy, his majesty recites, “that finding, by experience, that neither admonition nor moderate invective doth work the ends which he aimeth at, he is pleased that some lawful proceedings be now had to *overthrow the charters of one or two principal cities or towns, by scire facias, quo warranto*, or otherwise, as his majesty did prescribe in his instruction, under his hand and signet, to you the Lord Chichester, about two years since; of which towns the first which we wish were proceeded withal are *Limerick and Kilkenny*; but forasmuch as this course of *scire facias, quo warranto, &c. will require a time before it can effect a full forfeiture* of their liberties, we think it very requisite that the magistrates, and the electors of recusant magistrates, be *generally proceeded against roundly, (as his majesty hath formerly prescribed,)* BY FINE AND IMPRISONMENT; which being as much as we shall need to say, at this time, for your direction, we do leave the execution now to your care and discretion.” Limerick.
Kilkenny

What had been the previous intimations of the king to Sir Arthur Chichester, may be collected from the following letters: the first transmitted by the king in the 4th year of his reign, addressed to the lord deputy in Ireland, which commences by observing, “that having found great benefit from the farming out of customs and impositions upon merchandises in England and Scotland, &c., he thought it convenient to make trial of the increasing of the revenues by like means” 1606.

* Harl. MSS., 4784.

James I. in Ireland—and therefore required the lord deputy, &c. to
 1606. take a due examination of all points contained in the annexed
 memorials.

“That he might compel all persons to make their *personal*
 Charters. attendance, and to bring with them their *charters, grants,*
 and evidences whatsoever, whereby they claim any title to
 receive sums of money for custom, &c., or exemptions from
 payment of the same. And such charters, grants, and
 evidences, to show and deliver up to the lord deputy and
 council, or to such persons as they should appoint.

“That copies of all grants and charters, with the accompt
 of his majesty’s office for the last seven years, *be sent to the*
privy council of England to be considered of. And that they
 might examine the parties concerning their grants, as to their
 unlawfulness, inconveniency, and hindrance to his majesty;
 and that their answers should be transmitted to England.

Mis-
 recitals.

“That the lord deputy, &c. should consider what words are
 of absolute necessity to make them good in law, and what
 omissions make them weak and void; likewise for mistakes
 and misrecitals.—What circumstances in the passing, enrolling,
 confirming, or such like are necessary; whether all
 have been done accordingly, when, where, and by whom.

“In the causes alleged for such grants, whether they were
 truly alleged at the time of the grant, and whether true in
 such sort and manner as was then alleged; whether such
 cause continue still or cease; and whether there be not now
 greater cause to the contraries.

“Whether any grievance at any time heretofore have been
 found, or complaint made against any of those grants, or the
 parties executing them; by whom, what, when, and for
 what causes. What sums of monies or duties have been
 claimed by virtue of any grant; what of *townsmen and free-*
men, and what of *strangers and foreigners, &c.*”

1607. The next letter was in the sixth year of the king, to Sir
 Arthur Chichester, to this effect:—

“We have of late received from you, the copies of divers
 Charters. *charters* granted by sundry kings and queens of England,
 his majesty’s progenitors, unto several cities and towns in

the kingdom of Ireland, together with several suits of *quo warranto* and pleadings thereupon, concerning the customs: all of which, his majesty's learned counsel in England have given us to understand, the privileges of such towns as have already pleaded, are not only insufficient in law, but their grants also of no validity to give unto them the subsidy of *tonnage and poundage* which they claim by the same; and for those other towns which have not pleaded, the charters upon which it seemeth their claims must be founded, will not serve to give the subsidy of *tonnage and poundage* unto you; so that it appeareth unto us, that none of them have any ground, either to free themselves from paying unto his majesty the said subsidy of *tonnage and poundage*, due by themselves, nor to enable them to take the same from *strangers* to their own use. In regard whereof, they having for many years taken the same as their own, it would not be amiss they be made known they are in arrearages to his majesty in great sums of money, which if he should with severity exact, as he may, must be very heavy and burdensome upon them; nevertheless, because his majesty has a meaning to deal graciously with them, is pleased that you should summons them together, to come before you, and then to let them know the weakness of their pretensions and claims, with this further offer, in case they would guild themselves from henceforward to pay subsidies of *tonnage and poundage*, and refrain the receiving of the customs of *strangers*, that his majesty will be pleased to remit and pardon all the past concerning the same:—which gracious offer, if they shall wilfully contemn, and only stand hazard and trial of the law, it shall then be fit for them to advise themselves how easy it will be unto them when his majesty shall be against his will constrained to make use of that which law and justice will afford him. Lastly, because we hear it hath been spread abroad that his majesty means to bestow the benefit of the customs in that kingdom on some of his great servants or subjects, we have thought good to let you know, that although his majesty is to give no account to any what he doth with his own, yet that is far from his

James I.

1607.

Quo warranto.

Tonnage,
&c.


James I.
1607. intention to grant the benefit of that which shall arise by the custom of the whole kingdom, though his majesty hath been served by persons of great and meaner quality, to look into the wrong detention of that which is due, and therefore we pray you use your best means to make the same known."

Quo war-
ranto. While the *quo warranto* proceedings were pending for judgment in the King's Bench in Ireland, the king specially directed that *Waterford* and the other corporations should send over their agents to England with their *charters*, in order that the question of customs might be heard before the judges there. And in Mic. T., 6 James I., the lords of the privy council referred the question to the judges, who heard counsel and agents for the corporation, at Serjeant's Inn, Chancery Lane; and afterwards signed a certificate of such customs and duties as they considered payable in each corporation.

1622.
King's commis-
sion. The king also, in the 20th year of his reign, issued a commission of inquiry as to the state of the church, the law, revenue, and corporate property in Ireland, giving the commissioners the most extensive powers. As the commission is of considerable length, and may be seen at the Rolls Chapel, we shall only quote a few passages.

It commences by reciting, that the king's object was the advancement of religion and justice, the removing of grievances, increasing of trade, settling of plantations, and the securing of the kingdom.

The commissioners were empowered to examine all witnesses *upon oath*, or without oath, and to *compel the production of all documents and records, &c.*

Charities. That they should inquire what lands, rents, &c. had been given to any college, free school, or to the maintenance of any corporation or other charitable or public use or uses, where they lay, and their value; what lands, rents, &c. had been, since the first year of Queen Elizabeth, converted to the use of any private person, or to any other use contrary to their original institution, and to consider what means should be adopted for their restoration, &c.

That they should inquire whether trade or commerce had been hindered by means of any *charters*, letters patent, &c.

James I.

Trade.

DUNGANNON.

The manner in which the courts of law dealt with the new boroughs in Ireland, may be collected from the following charter to *Dungannon*, which we give as a specimen of those grants, and upon which a case was decided in the 18th year of James I.

The charter is in the 10th year of this king.

1612.

And it recites,—that at the request of the *inhabitants* of the village of Dungannon, in the county of Tyrone, in the province of Ulster, the king had ordained that the village of Dungannon, and the three parcels of land known by the following names of Crosse, Droughe, Terneskeile, and the precincts of the same, (except the *castle* of Dungannon, and 500 feet of land circumjacent thereto) should be one entire and *free borough* of itself, by the name of the borough of Dungannon; and that within the same there should be one *body corporate* and politic, consisting of one provost, twelve free burgesses, and of the *commonalty*; and that the *inhabitants* within the village and lands, should be a body corporate and politic, by the name of “The provost, free burgesses and *commonalty* of the borough of Dungannon.”

Castle.

Free
borough.

Corporate.

Common-
alty.
Inhabitants

The usual corporate powers are then granted. And that the provost, free burgesses, and their successors for ever, might have full power and authority to elect, send, and return two discreet and useful men to serve and attend in any Parliament in Ireland to be held, &c.

And to the intent that in future this *new* incorporation—*now first composed*—should consist of good and honest men, the king did constitute and name the provost and the twelve free burgesses; and that the *inhabitants* of the village, and so many and such men, as the provost and the burgesses of the borough for the time being, should admit into the liberty of the borough, should be the *commonalty*.

Common-
alty.

That the provost should be elected from the free burgesses; and upon the death or removal of a free burgess,

James I. the vacancy should be supplied by the election of the provost
 Dungan- and the rest of the free burgesses, from the better and more
 non. honest *inhabitants* of the borough.
 1612.

That the provost, free burgesses, and *commonalty* should have a court of record of all pleas happening within the borough.

Bye-laws. That the mayor, burgesses, and *commonalty* might make bye-laws for the government of the borough and inhabitants.

A guild merchant is then granted to the provost, free burgesses and commonalty; also a common seal; and powers to make serjeants-at-mace, for the better government of the borough and inhabitants.

This charter makes Dunganon a free borough in the manner of the English charters, and expressly incorporates the provost, free burgesses and commonalty, and the *inhabitants*, by the name of "the provost, burgesses and commonalty."

The vacancies are to be filled up by elections from the *inhabitants*, in the same manner as the English charters of this date; and there are also other provisions like the English.

With reference to this grant, the following case occurred
 1614. in the 18th year of James I.

Case. The king constituted the town of Dunganon to be a free borough, "et ulterius volumus, declaramus, et statuimus, "quod *inhabitantes* villæ predictæ sint unum corpus *corporatum*, per nomen præpositi, 12 burgensium et *communitatis* Dunganon, et per idem nomen placitare possint: et "quod ipsi prædicti præpositi et burgenses et successores "sui habeant potestatem eligendi duos burgenses, &c. ad "Parliamentum, &c." And the doubt was, whether this grant of election of burgesses of *Parliament* was good, because it was granted but to parcel of the body—scil: to the *provost and burgesses*, and not to the provost, burgesses, and *commonalty*.

And the chief baron thought, that, forasmuch as this was but a nomination or election, it was sufficient to make the provost and burgesses only to have it.

And he took a diversity betwixt nomination and other inheritance.

James I.

Dungan-
non.
1614.

But this was denied by all the justices and barons ; for this power to elect burgesses, is an *inheritance* of which the provost and burgesses are not *capable*, for that it ought to be vested in the *entire corporation*—scil: provost, burgesses, and *commonalty*.

And it seemed to Hobart, chief justice of the Common Pleas, that the king may grant to the *inhabitants* of Islington to be a *free borough* ; and that the burgesses of the same town may elect two burgesses to Parliament: and it should be good, although the burgesses were not incorporated ; for there *are many burgesses which are not incorporated, who elect burgesses to Parliament*. But it was resolved by all, that such a grant made by the king should be void ; for the *inhabitants* have not capacity to take an *inheritance*, as in 15 Edward IV., to *have common*. And the passage from Littleton, cited before as to burgage tenure, was quoted.

And it was said that, it should be intended, that at the first they were incorporated. Also, plus valet sæpenumero vulgaris consuetudo, quam regalis concessio.

But it was resolved by Hobart, Tanfield, Altham, Winch, Nichols, and Houghton, quod volumus, was a good word of grant, as Piggot was of opinion, in the 21st of Edward IV.

And this shall be an implied grant to *all the corporation*, that the provost and burgesses should elect, &c. and regularly, when the grant is indefinite—scil: first, concedimus an uncertain thing, et ulterius quod præpositus, et burgenses, et successores sui elegerint ; this shall be within the first concedimus to *all the body* ; which party shall choose.

But the chief justice of England, and Doderidge, thought the contrary ; for, in this case, there was but an *ordinance* to erect the corporation, and no grant altogether to any person, so that this clause, et quod, &c. is idle and vain.

And note, *all the new corporations were of the same form*, and in none of them is there any clause to elect new burgesses. So that when those of the modern burgesses die, this power to elect burgesses is gone.

James I. The real question in this case seems not to be properly
 Dungan- stated.
 non.

1614. The substantial doubt must have been, as subsequently in
 Newark. the *Newark* case in England, whether the king had the
 power, for the purpose of procuring an *ascendancy in Parlia-
 ment*, of creating a number of new boroughs.

That the king by his prerogative could, whenever the
 population of any place or other circumstances rendered it
 necessary for the public good, that there should be a separate
 jurisdiction exempt from the sheriff, direct that it should be
 a borough, there can be no doubt.

On the other hand, that the king could not do this without
 such cause, and for the purpose of interfering with Parlia-
 ment, is equally clear in a constitutional point of view.

But if the king should grant such a charter for the public
 good, then all the consequences would constitutionally follow
 of its *separation from the county*; and the sheriff, on the
receipt of the writ for parliamentary elections, would direct
his precept to the head officer of the place, as a borough, to
return members to Parliament.

It is also equally clear, that if the king conceded such a
 charter, he could not constitutionally grant that a part only
 of the burgesses should elect the representatives, because
 that would in effect be giving an exemption to the others,
 which upon principle, as well as the express authority in the
 4th Inst. cap. 1, he could not grant.

In truth, the king could not legally make any charter
 directly respecting the return of members to Parliament, for
 that would be to interfere with the other branch of the legis-
 lature; although he might do it indirectly by the exercise of
 his prerogative as the head of the executive government,
 and having necessarily the power of directing within what
 districts, whether of counties or boroughs, the law should be
 administered.

Therefore the question should not have been put, whether
 the grant to the free burgesses only was good. But that
 part of the charter should have been treated altogether as
 void; and the election considered as belonging to the whole

body of the *inhabitants* under the name of *commonalty* ; as justified by the charter, and the practice which we have seen above of other places.

James I.
Dungan-
non.
1614.

The only proper question was, whether Dungannon and the other places had been made boroughs with a view to the public good and the better administration of the law, considering the extent of the population, and other circumstances :—or whether they had been so made for the purpose of influencing Parliament.

If for the former, they were good. If for the latter, they were, by the principles of the constitution, unjustifiable and *void*.

With all due submission to the judges who interposed in that case, such constitutional principles would seem to be more pertinent to the question—than the technical point, that the grant was good as a nomination or election ; which, in truth, is not a very intelligible distinction. And the diversity betwixt a nomination and other inheritance, may safely be asserted to be fit only for the comprehension of lawyers.

The position of the other judges, that the power to elect is an inheritance, is also, to say the least of it, not so plain and simple as the constitutional position, that it is a *duty* cast upon every *free inhabitant householder*, who has sworn to his allegiance.

But the position, that the power ought to be vested in the whole body, is most correct ;—as well as the doctrine, that *Burgesses. the burgesses might elect, though not incorporated*—which we have shown to be supported by the earliest principles of the law ; as well as proved by fact.

The following part of the judgment exposes the errors resulting from the adoption of the unfounded assertion—that the right of election was an inheritance ; because it is followed by the still more erroneous position, that inhabitants were not capable of taking an inheritance :—a doctrine which is shown, by the earlier cases and charters, not to be true in fact ; and applied as it is here, is most absurd :—because it militates with the known circumstance, that the *inhabitants* *Inhabitants*

James I. of the counties did vote generally till the statute of Henry
 Dungan- VI.; since which also the *freeholders*, though a limited class
 non. of the inhabitants, can only vote in that right.
 1614.

Common. The cases respecting the right of *common* we have before
 commented upon, as well as the passage from Littleton.

But the court said, it should be intended that at first the
 boroughs were never incorporated.

In fact we have shown, that they never were so.

The concluding resolution, that it should be implied to be
 a grant to all the corporation, is much more reasonable, and,
 in truth, gives a fit construction to the charter consistent
 with the general law and practice,—had not the chief justice
 and the other judges thought the contrary, on the technical
 ground that it was an ordinance, and not a grant.

The note at the bottom of the case is clearly inaccurate,
 in saying, there is no clause to elect new burgesses; for, if
 that term applies to the 12 free burgesses, there is an express
 power, upon death or removal, to elect others from the
inhabitants;—and if the term is applied to the burgesses
 generally, there is direct authority to the provost and free
 burgesses to admit such and so many into the liberty, to be
 of the *commonalty*, as they should think fit.

Thus, not intending disrespectfully to dispute the decision
 of the judges of the land—but called upon by the authority
 of truth and reason to investigate the real grounds of their
 decision, we trust we do not err in contending that, although
 the peculiar circumstances then existing in Ireland, and par-
 ticularly with reference to these new boroughs, might at the
 time have tempted the great authorities who decided this
 case to yield in some degree to the necessities of the times—
 yet, at this distant period, we may not only be warranted,
 but compelled to aver, that in the particulars to which we
 have referred, it is unsupported by principle, and unfounded
 in fact.

Besides the grants so much disputed to the new boroughs
 and corporations in Ireland, new charters were likewise
 given to some of the ancient boroughs. But as their pro-
 visions so much resemble those which were granted in the

same reign to the boroughs in England, little more will be requisite than to give their dates, and some short extracts, to show the nature of their contents. James I.

LIMERICK.

Limerick, in the sixth of James I., received a charter, 1608. which commences with a recital,* stating the great services the citizens of Limerick had rendered the king against the rebels,—and that they might be bound further to render him assistance, granted that Limerick should be for ever a *free city*—that the mayor, bailiffs, and *citizens*, and the citizens and *inhabitants*, should be one body corporate and politic, by the name of the “mayor, sheriffs, and citizens of the city of Limerick.” The usual corporate powers then follow; and that they should enjoy all previous charters, &c. by whatsoever name of incorporation, or whether incorporated or not. Certain boundaries are then defined, to be called the county of the city of Limerick, and to be *from the county for ever distinct*, &c. &c. Corporate.

That there should be one of the most honest and discreet *citizens* of the city, who should be called the *mayor*, and that he should be chosen and elected as the citizens had hitherto been accustomed.

That in the place of the bailiffs, there should be two sheriffs. That the mayor, sheriffs, and citizens yearly should elect two of the most discreet and honest *men* of the city to be elected sheriffs, &c.;—that they should have the same power as all other sheriffs of the county had, and should hold their courts from month to month, having the *return of all writs*—and that no other sheriff should interfere. Men. Return of writs.

That all other officers of the city should be elected in the manner accustomed therein. That they should have an admiralty jurisdiction—cognizance over all real and personal actions, &c.—that they should have all amercements, fines, profits, &c.

Powers are then given that they might assemble, as those of the cities of Dublin and Waterford did, or could do;—

* Pat. 6 Jac. I. p. 12, n. 9.

James I. and that they might elect from among themselves a mayor and other officers,—and make rules and orders for the good government of themselves.

ATHBOY.

1609. The king, in the seventh year of his reign, granted to the *free burgesses* and *commons* of the town of *Athboy*, by whatever name the *resident inhabitants* were called or known, Corporate. that it should be a free borough *corporate* by itself, by the name of the town or free borough of *Athboy*.

That the then provost, and twelve other persons who are named, and described as “lately burgesses of the town or borough,” and those who were then the *commons* and *inhabitants* of the town, as well as those who should be made free burgesses and commons of the town, were to form the body corporate.

That the free burgesses and commons, or the major part of them, might annually elect of the free burgesses a fit Provost. person to be *provost*. And that as *vacancies* occurred in the twelve burgesses, the provost and other free burgesses, the *commons*, or the major part of them, from time to time, might elect another fit person in the place of such free burgess.

Oaths. That every free burgess and freeman, who should be *elected* and *admitted into* the franchise of the town or borough, should take before the provost of the borough, such *oaths* as were *of old used* and administered to the burgesses and freemen in the town or borough.

A recorder and two serjeants-at-mace, are then appointed. And it is directed that the provost should be a justice and warden of the peace, with powers to hold a court in all personal actions not exceeding 10*l*. That there should be a Strangers. fair, with a court of pie powder, and that no *stranger* or *foreigner*, who was not a free burgess, or one of the commons of the town or borough, should enter within the town to sell any wine, &c. except by the license of the provost.

KILKENNY.

This king, in the seventh year of his reign,* granted a charter of incorporation to *Kilkenny*, which, after commencing with a recital of the love and affection he bore the *inhabitants*, &c., granted that it should be one entire and free city, and that all the free *inhabitants* within the high town of Kilkenny and the Irish town, as well those who are now free, as those who shall hereafter be admitted or elected should, by the name of the mayor and citizens, be one body corporate and politic. The usual corporate powers then follow. And it is directed that there should be within the city, one of the most wise and discreet *inhabitants*, who should be named the *mayor*; that there should be, 18, 17, 16, 15, 14, 13, 12, 11, 10, 9, 8, 7, 6, of the most worthy and discreet citizens, who should be called the *aldermen*, and be of the *common council*, and assistants to the mayor in all matters touching the city, with power to make ordinances respecting the government of the *inhabitants*, artificers, &c. And that the mayor should be the escheator.

Certain boundaries are then described, which are to be *incorporated* and belong to the city of Kilkenny, and to be called the *county* of the city, and to be separated from the county.

That there should be two sheriffs to execute all precepts within the county of the city, with the same powers as all other sheriffs, and that no other sheriff should intromit.

That the mayor and citizens might yearly elect two citizens of the city, to be the sheriffs. That two of the most worthy *inhabitants* should be coroners. And that the aldermen, after having served the office of mayor, should be justices of the peace.

Jurisdiction is given over all real and personal actions—the punishment of felons.—None of the citizens were to be compelled to appear, or serve upon any inquisitions, assises, &c., *without the city*. The charter then closes with

* Pat. 7 Jac. I., p. 40, n. 16.

James I. a grant to the merchants of the staple, and a general confirmation of all previous charters.

WEXFORD.

1609. James I., in the seventh year of his reign, granted a charter to *Wexford*, which recites, that at the petition of the superior bailiffs and burgesses, he had granted to them, or by whatever other name the *dwellers* or *inhabitants* of that town or borough might be called or known, that it and its suburbs, for ever thereafter, should be a free borough *corporate* by itself, and be called the town or free borough of Wexford; and that within the town or borough, one body incorporate and politic should be of the *dwellers and inhabitants* of the same, consisting of one mayor, two bailiffs, free burgesses, and commonalty.

Inhabitants.

That there should be 24 free burgesses in the borough, of whom the mayor and bailiffs for the time being should be three.

The mayor and two bailiffs are then appointed, and described as being of the town or borough; and 21 persons free burgesses, who were of the better or more discreet *men* of the town or borough; all constituting the common council.

Common council.

That all freemen, then *dwelling*, or thereafter to *dwell* within the borough, were to be the "commonalty" of the town.

The free burgesses and commonalty were to elect yearly from among the free burgesses, a *mayor* and *two bailiffs*, who should take their oaths of office before the free burgesses and commonalty, in the "Tholsel" of the borough: and every freeman who might be elected and admitted into the franchise of the town or borough, should take before the mayor and bailiffs so many and such oaths as of old were used and ministered to the *free burgesses* and the *freemen* in the borough.

Mayor and two bailiffs

Tholsel.

That the mayor might call assemblies (*comitiæ*) in the Tholsel of the town, to make laws for the government of the town, &c.

That there may be within the borough a *guild of merchants*, with all liberties thereto, &c. And that no one who was not of the *guild*, any merchandises within the town or borough should sell, unless at the pleasure of the mayor, bailiffs, free burgesses and commonalty; and that they may be able to divide themselves into different guilds or fraternities, according to their several arts and mysteries; using the several vestments and insignia, as marks of their fraternity and mystery, and might have a hall within the borough where the brethren might be able to congregate, and yearly constitute one guardian or prefect.

James I.
Wexford.
1609.

Certain laws, liberties, &c. are then granted to the mayor, bailiffs, *free burgesses* and *commonalty*, to be held by *burgage service*, rendering yearly 10*l.*, notwithstanding the statute of mortmain, &c., and that the village and lands of Maudlenton and Killian shall be reputed within the liberties of the borough of Wexford, and exempt from all taxes, &c., leviable upon the county. All previous charters, &c. granted to the *burgesses* or *inhabitants*, by whatsoever name or incorporation, are then confirmed.

KINSALE.

James I., in the eighth year of his reign, confirmed to the sovereign and *commons* of *Kinsale*,* all the charters, privileges and customs which they had ever thitherto enjoyed, but directed that the corporation should not interfere or exercise any jurisdiction within the castle or fortress of *Castle Park*, or within the precinct of land, or peninsula whereon the same is erected, or within the port of Kinsale, or within any bay or creek thereto belonging, that the full power should remain in the constable of the *castle* for the time being.

1610.

NEW ROSS.

James I., in the ninth year of his reign, granted a charter to the town of Rosspont, otherwise *New Ross*,† which commences with a recital that it was an ancient borough, and a convenient place to render aid to the faithful and liege,

1611.

* Egerton MSS. 76, 17.

† Egerton MSS. 76, 3.

James I. *dwelling* in those parts; that the *burgesses* and *inhabitants*
 New Ross. had rendered services to the king's progenitors, and had
 1611. withstood the attacks of the rebels, and therefore the king
 being willing to "refresh the *burgesses* and *inhabitants* in
 "the fountain of his favour and grace;" and also upon the
 petition of Richard Archdeacon, esquire; the king granted
 to the sovereign, *burgesses* and *community*, and to the *settlers*
Inhabitants and *inhabitants*; that the *free burgesses* of the borough might
 for ever be one body corporate, &c., by the name of the
 "Sovereign and free burgesses of New Ross."

That the sovereign and *free burgesses*, and also the *inhabitants*
 and all other freemen of the town, might exercise all
 the franchises as the sovereign, *burgesses*, and *community*, or
 the *inhabitants* had ever enjoyed, by whatsoever name or
 names of incorporation.

Admission
 of freemen.

The election of sovereign, recorder, coroner, &c., are then
 provided for. And that the sovereign and free burgesses
 might choose and admit so many and such of the *inhabitants*
 and residents of the borough, as well aliens as natives, whom
 or which they please, to be *freemen* of the borough, so that
 such *inhabitants* and *residents* may use free commerce through
 all the liberties of the same, &c.

BELFAST.

1613. The king, in the 11th year of his reign,* granted that
 Incorporated. *Belfast* should be a borough, and *incorporated*, to consist of
 a sovereign, 12 *burgesses* and *commons*. That the sovereign
 and *burgesses* should send two members to Parliament. That
 the sovereign should be chosen out of three discreet and
 sufficient *burgesses*, to be nominated to the sovereign and
 burgesses assembled for that purpose, by Arthur Lord
 Chichester, of Belfast, and his heirs; and in default of such
 nomination, the sovereign and burgesses should make their
 own free choice. That the sovereign and burgesses might
 Bye-laws. make bye-laws, with the advice and consent of Arthur Lord
 Chichester and his heirs, being lords of the castle. No
inhabitant to plead or be *impleaded out of the borough* for

* Egerton MSS. 128.

any demand within the same. That no person should sell James I. or expose any goods by retail, within the space of three Belfast. miles of the town, without the consent of Arthur Lord 1613. Chichester, or be *resident in*, or *inhabitants* of the borough, under forfeiture of their goods. The sovereign to be a justice of the peace within the borough—and the burgesses to have a mercatorial guild, &c.

CARLOW.

Carlow also received a charter from James I., in the 11th 1613. year of his reign, making the town a *free borough*, intrusting the government to one portreeve, 12 burgesses, the *commonalty*. And that the inhabitants should be a body corporate, Inhabitants by the name of “portreeve, *free burgesses, commonalty, &c.*”

That the portreeve and free burgesses might elect two members to Parliament.

That all the *inhabitants*, and all *others admitted by the portreeve and free burgesses, should be the commonalty.*

And that the free burgesses should be elected out of the *inhabitants.*

As the charters which we have above quoted satisfactorily establish that *the grants of the crown to the ancient boroughs in Ireland, were in substance the same as to those in England*:—So the municipal documents would show that the practice and *usages* in the Irish boroughs, continued the *same* as they had been from the earliest times;—resembling the customs in England: and, like them, founded upon the common law, and the principles applicable to freedom and villainage, which we have before so frequently explained.

CORK.

Thus, as one instance will suffice for the rest, it will be seen that in the city of *Cork*, in this, as well as in subsequent reigns, persons were recognized as of *free condition*, and were admitted as *freemen*, on the ground of their being the *sons* of freemen, and having served *apprenticeships*, and by marriage, as in England.

- James I. Whether accident or design may be the cause, the corporation of Cork do not possess any records respecting the internal regulation of their city, or the rights of the burgesses—the class from whence they were taken—nor the form of their admission, previous to this reign.
1608. The first entry we find, is an *admission* to the *freedom* of the city, in the 6th of James I.
1609. Freedom. “Edward Goold Fitz Edward is *admitted* to his *freedom*, in consideration of his pains taken for the city and corporation causes in the King’s Bench in Dublin, and to continue their attorney hereafter.”
- After which, we find the following entries :—
1617. Appen- “John Fleming, who served his *apprenticeship* with John tices. Matthew Fitz James, merchant, above seven years, was admitted to his freedom for 3*l*.”
1620. Mayor’s “Walter Goold Fitzwilliam, was admitted to his freedom son. upon payment of 10*s*., in regard that he is the *mayor’s son*.”
1621. Appen- “Richard Domville was admitted, upon payment of 10*s*. to tices. the chamberlain, in regard he served his *apprenticeship* in the city seven years, and promised to *marry in the city*, or to pay according to the bye-law.”
1651. “Philip Hoare was *sworn* a *freeman* in this city, upon payment of four nobles; he was also sworn, that if *he did not marry in this town* he should perform the contents of the bye-law.”
1694. Marriage. “Jonathan Presilian was admitted free of the corporation by the right he claimed, as being *married* to the eldest *daughter* of a *freeman*.”
1715. Marriage. “Richard Daunt Merchant, having *married a freeman’s daughter*, was admitted *free*.”
1715. Marriage. “Mr. William Nicholson, having married the *daughter* of an *alderman*, (Joseph Franklin,) was *admitted to his freedom*.”
1615. A document occurs in the 12th year of James I., which shows that Ireland, at this time, resembled England in other respects, and that *bribery* had made its way into the municipal elections. But notwithstanding all that the king had

done with respect to the boroughs—notwithstanding the municipal offices had become objects of desire, and there was an inclination on all hands to interfere with and control the municipal elections, yet it will appear by this case that the right of election was still left in the “*commons*” of the city. James 1.
Cork.
Commons.

The following case was submitted for the opinion of Sir Gerald Aylmer, C. J. of the C. B. and other judges in England:*

“Here followeth the case hanging now in variance wherein we desire your advice. And to the intent you may better understand and assoil the same, you shall know, that the mayor, and both the bailiffs of Cork for the time being, according to the use and customs of the same, ought and must choose and elect three good able *men*; that is to say, every of them one man. Of which three good able persons the *whole commons* of Cork aforesaid, shall elect one to be their governor and mayor. So the case is this,—one of Cork, aforesaid, came to one of the bailiffs, and bargained, and covenanted, and delivered unto him a certain sum of money for the electing and choosing of him to that purpose; and so he did; and was elected and made mayor by the *whole commons* of the same that year, by the means of the said bailiffs six year ago. Now, whether the same person so elected, and made mayor, ought to have restitution of his money so delivered, in manner aforesaid, or not.”

To which the judges gave the following answer:—

“In our hearty manner, this shall to advertise you how that John Coppinger has desired us, upon the case aforesaid, to certify you of our opinion therein, least that you upon the same to be sued before you, in fault of knowledge, should ordain the same other than the order of the king or sovereign lord’s laws. Wherefore we do certify to you, that the person which did give the money aforesaid to the other, cannot have action to recover the same money again, Answer of
the judges.

* Roche MSS.

James I. nor other recompense, therefore be the order of the said
Cork. law; so knoweth our lord, who preserve you.

“ Your loving friends,

“ Gerald Aylmer, Justice.

“ Thomas Eutzell, Justice.

“ James Bath, Baron.

“ Thomas Cusacke, mr Rotlor.”

WALES.

One specimen will suffice to establish, that the royal grants to *Wales* continued in this reign as in the former, on an equal footing with England.

The following charter to Cardiff will show that it was granted to confirm the previous provisions which had been enjoyed by the burgesses and *inhabitants*.

CARDIFF.

1609. King James, in the sixth year of his reign, granted a charter to *Cardiff*, which commences by reciting that it was an ancient and populous town; and the *burgesses and inhabitants*, by several names, from time immemorial had enjoyed liberties, &c. from charters and prescription. And that the bailiffs, aldermen, and burgesses had besought, for the better government of the town, that they should be created anew by whatever name or names they were then incorporated, or had been thitherto incorporated, into one body corporate and politic, by the name of “ the bailiffs, aldermen, and burgesses of the town of Cardiff.”

The king, in consequence thereof, and for the better government of the people and *inhabitants*, then granted that it should be a free town—that the bailiffs, aldermen, and burgesses, should have perpetual succession—be a body corporate, &c., with the usual corporate privileges. It then provides that there should for ever be twelve burgesses to be called *aldermen*, of whom two should be the bailiffs; and twelve burgesses to be named *chief burgesses*; all of whom were to compose the *common council* of the town.

Powers are then given to the common council to make ordinances for the government of all the officers, ministers, artificers—inhabitants and residents within the town. James I.
Cardiff.
1609.

All fines and amercements, &c. were to be applied for the benefit of the bailiffs, aldermen, and burgesses.

The aldermen are then named, and described as burgesses : and powers are given to them, as vacancies occur, to elect other burgesses of the town.

That the election of bailiffs, chief burgesses, and other officers, should be made in the same manner as in times past.

A steward is appointed—the constable of the castle of Cardiff, bailiffs, and elder aldermen, were to be justices, with jurisdiction over misdemeanours ; and to keep the weights and measures. The bailiffs were to be coroners and escheators—a fair was granted, with a court of pie powder and a court of record, to be held before the bailiffs. A confirmation of all previous privileges and exemptions from toll, &c. concludes the charter.

SCOTLAND.

With respect to *Scotland*, also, we may make the same observation—that the charters to that portion of the kingdom in the reign of James I., were in substance the same as those in England, being granted to the burgesses and *inhabitants*, Inhabitants and incorporating them, as well as giving them the power of making burgesses and freemen, a grant which was more general in that reign.

As to the other provisions, they mostly resembled those we have given in the reign of Queen Elizabeth.

CONCLUSION.

We have at length concluded the documents of this important reign, in which we have seen the king, in the first instance, pursuing the steps of his predecessor, and increasing the members to Parliament, by summoning new places to make returns ; but after some time, finding the inconvenience of such a course, it was abandoned, and the more effective

James I. method resorted to of controlling the boroughs which already existed.

In some respects the courts of law were subservient to the views of the crown, but at length, towards the close of the reign, the celebrated committee, to which we have so frequently referred, with great moderation, but at the same time with firmness, laid down those sound constitutional principles which served as a check on the crown upon the one hand, and a restraint upon the irregularities of the people on the other; by restoring the ancient class of burgesses, under the denomination of *the inhabitant householders resiant*—from which all the other essential consequences follow, of *local responsible residence*, where the party is *known*, and his *character* duly appreciated—of liability to all burdens, pecuniary and personal—*scot and lot*—and of responsibility to the law, by being *sworn* and *enrolled* as a *resiant*.

It is one of the distinguishing characteristics of our constitution—our system of government—and the nature and habits of the people; that whatever may be the encroachments, or violent acts of the crown upon the one hand, or the more dangerous violence and inordinate desires of the people on the other;—yet if the temporary excitement is allowed to subside, and time is permitted leisurely to do its work, our institutions will correct themselves—the vessel of the state will right—and the constitution, through all its dangers, be safe and inviolate.

Thus it was during the violent reign of King James; and although he did all in his power to further the plans of influence which had been before commenced—and was aided in his endeavours by circumstances, both within and without these kingdoms, yet was the substance of the constitution left unimpaired; although he had laid the foundation of future evils and usurpations which have gone on increasing to the present day; and which will leave us, in the succeeding reigns, little more to do than to record the gradual progress of those mischiefs which had been so unfortunately commenced; and in the increase of which, the law and the people themselves have been too instrumental.

CHARLES I.

Charles I. auspiciously began his reign with the constitutional and wise measure of summoning a parliament, which he seems not to have adopted reluctantly or misgivingly, but even with eagerness, and a sincere desire of meeting the two Houses, who assembled on the 21st of June:—less than three months after the death of James I. No disposition was shown to influence their proceedings, but, on the contrary, restraint is said to have been placed on those connected with the court, to prohibit their making any effort to guide their judgment. *votes of the Electors*

1625
to
1649.

Happy would it have been for England if that disposition had continued, and been fostered by a cordial inclination in the Parliament to meet their monarch half way in the measures he meditated; and ~~for both~~ ^{that} ~~a~~ had co-operated in seeking honestly the good of the country.

Unfortunately the contrary was the conduct of both parties—each exasperated the other. The king's disposition to assert his prerogative, aided by the offence given by his favourite, had a strong tendency to indispose the Houses of Parliament to allow the necessary claims he made upon them: and, on the other hand, the severe course adopted by Parliament to resist the improper extension of the prerogative by the king, and to restrain the baneful power of the favourite, drove the monarch to measures far beyond what might ~~otherwise have been necessary for him~~ *was* or justifiable.

It is ~~at this period~~ ^{now} but of little importance to consider what might have been the effect if a different temper had governed each party; the only application we can ~~now~~ make of the terrible scenes which followed, is to shun the dangerous course of driving matters to extremities.

The great men who had so strenuously, yet moderately, protected the constitution, and maintained the cause of national freedom, in the last reign, continued in the House of Commons in the first Parliament which Charles I. summoned;

Charles I. but unfortunately, for the reasons we have mentioned before, they did not continue the same line of moderate conduct they had previously adopted.

They began to act as a party, and from the untoward circumstances of the times—agitated by political and religious excitement—they by degrees were drawn into measures, which probably they would not otherwise have adopted; and endeavoured to obtain, by artifice and management, those advantages for their party, which neither the interests of the country required; nor would a direct pursuit of the preservation of the constitution, or the protection of civil or religious freedom, have suggested.

The king's necessities, both foreign and domestic, were great and pressing; but no disposition was shown to relieve him from the embarrassment.

Statutes. The statutes which were passed during the first Parliament show the tone and temper of the time.

The first was for punishing divers abuses committed on the Lord's day, and prohibiting assemblies for unlawful pastimes on Sunday.

The second enabled the king to make leases of lands, parcel of the duchy of Cornwall, as one of the numerous measures at that time permitted for the purpose of enabling the king to provide for some of his necessities out of his hereditary property. A course apparently sanctioned by the party formed against the king, for the purpose indirectly of reducing his power; with which object the third statute seems also to be framed, as it was to facilitate the obtaining licenses of alienation.

The fourth statute was for the further restraint of tippling in inns, ale-houses, and other victualling houses.

The fifth and sixth gave three subsidies by the spirituality, and two by the temporality—the scanty pittance which the Parliament allowed the king to carry on the war which the country and Parliament had sanctioned.

The conference with the lords, and the violent debate as to the subsidies granted to the king, which close the

session—seem to have justified him in the course which Charles I. he took of appealing to the country by dissolving the Parliament.

The last message which the king sent to the House of Commons before the dissolution, thanked them for their good intentions; but desired them to consider, that his affairs required a speedy dispatch. And he pressed for a present answer about his supply; which, if it was granted, he gave his royal word, that in winter he would meet them again at what time they chose, and hold together until they had perfected all those things for the commonwealth and the king, which were then in conception.

In the debate, on the one hand, the great necessities of the king were urged, as well as the sums of money which had been raised by the sale of places and otherwise; and it was in vain pressed upon the House to abandon their fears, jealousies and disgusts, and to rely upon the king's promise to reform those disorders, which had not happened in his time, and which he had assured them of his desire and resolution to reform.

On the other hand, the danger of bad precedents and of granting subsidies in reversion were pointed out. It was even suggested, that his majesty might obtain credit for 40,000*l.* without any grant from Parliament; and Sir Edward Coke, using scraps of Latin to give points to his arguments, and citing the punishments which in former times had been inflicted on those who had pressed for more subsidies, offered to give rather out of his own estate 1,000*l.* than to grant any other subsidy.

Religion was, according to the spirit of the times, drawn into the discussion; and two days afterwards, Parliament was dissolved, upon the alleged ground of the raging prevalence of the plague.

A Parliament was summoned again in the winter of the same year, as the king had promised, although he had not obtained the supply for which he had asked. But the Parliament seem to have considered that they might compel this meeting by withholding the supply.

Charles I. Though so little was granted at the last meeting of Parliament, the first act which appears in the Journals after the assembling of the House, was one brought in for ministering an *oath* to make true account of all public rates, taxes and collections—an indication, at least, thus early in the session, of their suspicion of the misapplication of the public funds.

Two days afterwards, the chancellor of the exchequer delivered a message from the king, taking notice of the order for sending out writs upon the double returns; and adding, that Sir Edward Coke, being sheriff of Buckinghamshire, had been returned for the county of Norfolk, contrary to the tenor of the writ, and therefore he hoped the House would do him that right as to send out a new writ.

The commons proceeded to the consideration of the supply—the relief of their grievances—the king's estate—the accompt of the subsidies and fifteens, granted in the 21st of James I.—and the misgovernment—misemployment of the king's revenues—and miscounselling.

A few days afterwards, an act was brought in for the due election and free choice of the knights of the shire; and of the citizens and burgesses of cities, boroughs, and *towns corporate*; which latter expression, from the circumstance we have before abundantly shown, was inapplicable to the subject for which the bill was intended, for *no corporate towns*, as such, had a *right to return members to Parliament*; and on the other hand, boroughs *not incorporated* had *that right*.

The same term, however, occurs in the title of another bill, in which it was not so inappropriately introduced as in the former. It was an act for avoiding the increase of cottages, in cities, boroughs, towns corporate, and market towns; and also an act concerning *inmates*.*

It seems to have been an indiscretion on the part of the commons, that they constantly persevered in bringing under discussion the fundamental principles of the government.

The state of the king and kingdom—the king's settled revenue—formed subjects of inquiry before committees. And a discussion arose whether the ancient mode of describing

* 1 Journ. 620, 830.

the House as "the poor commons" should be continued in Charles I. the petitions.

The king however took these matters in good part, and thanked the House for their care in examining his estate, and gave leave to enter into it;* and sent to the House an account of the customs of Ireland, which at that time let for 13,000*l*.

A committee reported to the House that they had consented to the subsidies—the bill to be brought in for them as soon as the House had presented their grievances, and received the king's answer.† But it appears the king was afterwards frequently obliged to make application to Parliament for a supply.

The session passed on without any material business being done—the House of Commons, however, still driving matters to extremity, by calling for the commitment of the Duke of Buckingham—interfering with Cambridge in the election of their chancellor; and in every other respect, though apparently with an honest view, towards the good of the country, yet marring the success of the measures they contemplated by a want of temperance and moderation.

Another Parliament was called upon the 17th of March, 1627. the commencement of which was not more auspicious than the former. It began with an objection upon the part of the House, that the message sent to them to attend his majesty at the House of Lords was not sent by the knight of the black rod; and it was recommended, that the speaker should not stir until they had received a message through that channel; however, the House at length agreed to go to the king, who was waiting for them.

The lords and commons soon agreed upon a petition to the king, into which they introduced Magna Charta, and the early statutes against the levying of taxes, without the assent of the archbishops; earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm.

They complained of commissions which had been issued, and oaths which had been imposed upon the people, as well

* 1 Journ. 853.

† 1 Journ. 842.

Charles I. as, amongst other things, the quartering of soldiers upon
 1627. the inhabitants of divers counties in the realm, and the enforcing of martial law; as well as the exemption from punishment which had been allowed to many offenders by the forbearance of the ministers of justice. And in conclusion, they prayed that all these grievances should be redressed. To which the king answered, that "right should be done as was desired."

Nevertheless the House still continued to press complaints of grievances, both civil and religious; and unfortunately their conduct was met by equally unjustifiable conduct by the king.

It is needless to pursue this inquiry further; the rest of this reign being merely a continuation of the same conduct on both sides.

Statutes. It is only material to refer to the *statutes* which passed during this period, and the few occurrences in the House of Commons which will illustrate the history of the municipal bodies.

The statute next after the petition of grievances, was for the further reformation of abuses committed on the Lord's day.

Another, with reference to the great subject which occupied much of the attention of Parliament, prohibited the passing or sending of any to be popishly bred beyond the seas.

A third was for the better suppressing of unlicensed ale-house keepers.

The fourth was a highly useful enactment, for the continuance and repeal of divers former statutes, affecting many subjects of general importance; and the session closed with the grant of five subsidies by the spirituality, and five by the temporality.

COVENTRY.

1627. In the third year of Charles I., a question arose as to the return of citizens for *Coventry*;* one sheriff having returned

* 1 Journ. 874.

two gentlemen of the county elected by the major part, and the other sheriff returning two others *resiant* in the city.* Charles I.
1627.

The former two gentlemen not being either *resiant* or *free-men*, according to the statute of the first of Henry V. which was referred to, the committee most extraordinarily resolved, with one voice, that the two *non-resiant* and *non-freemen* candidates were duly elected.

Sir Edward Coke appears to have taken up the argument, and strangely to have contended, that though the act was in the negative, yet if they elected a *non-resiant*, it was good. And the sheriff who refrained from returning them, was called before the House upon his knees, and charged by the speaker to acknowledge his error in not returning the two *non-resiants*; which he accordingly did, pleading his ignorance: stating that he was misled by the statute of Henry V., and the House, upon an acknowledgment of his error, was pleased to remit any further punishment.

EXETER.

In the same year, a report of the election for *Exeter*, shows to how great a length the usurpations of the *select bodies* had at that time proceeded.†

Select
body.

Mr. Lynn and Mr. —, were returned by one indenture, and Mr. Lynn and Mr. Jordan by another. It was alleged that by prescription, the *mayor and common council* nominated four, out of which the *burgesses* chose two. That the mayor and 24 nominated Mr. Lynn, Mr. Martyn, and two others, but not Mr. Jordan; but that Mr. Jordan was chosen by greater numbers than Mr. Martyn.

That the sheriff, upon the nomination of the four had said, they might choose another.

Upon the question, whether the election and return of Mr. Jordan was good, it was decided in the affirmative.

And it appears afterwards,‡ that the magistrates, being defeated in their election, refused to pay the wages of the member who had been chosen by the commons, out of the

* 1 Journ. 880.

† 1 Journ. 875.

‡ 1 Journ. 994.

Charles I. lands given to the city for that purpose, although they paid
 1627. the other burgess.

The consideration of this matter was referred to the committee. And it was resolved, "that the mayor of Exeter should be sent for to the House, by a letter from the speaker."

COLCHESTER.

Select
body.

The anomalous election attempted at Exeter, as we have seen above, and the usurpation of the common council being set aside, we find the same done by the House of Commons with respect to an attempt made at *Colchester*, to return by the select body; who, assembling together in an upper room, to the number of 42, the bailiffs, aldermen, and common council, elected two members, whilst the "common sort of burgesses," (as the Journal states it,*) assembled in a lower room, and elected one of those before chosen by the common council, and a third person.

The House decided that the two latter were duly elected;—again negating the usurpation of the *select body*, who claimed a right to elect by *prescription*: but the evidence showing that there was no common council till the time of Edward IV., the prescription was held insufficient.

LEWES.

1628. The following day it was agreed, that the election at Lewes
 Inhabit- was to be made by the *inhabitants* :†—which in truth de-
 ants. scribes the right too shortly. For subsequently, in the 10th
 1736 of George II., the right was, according to the common law,
 decided to be in the *inhabitants paying scot and lot* :—who
 Burgesses. must therefore be taken to be the *burgesses*.

BRIDPORT.

Select
body.

In the case of *Bridport*,‡ also, the *bailiff and twelve capital burgesses* claimed the sole power to elect by *prescription*, and gave in proof an usage for 40 years; which, however, was answered by a prior usage to the contrary; and by the production of a return of the sixth of Edward VI. "per Ballivos

* 1 Journ. 876.

† 1 Journ. 877.

‡ 1 Journ. 883.

per assensum communitalis," to which it was replied, that the addition of the "*commonalty*" was made because it was the name of the corporation; that the leases were made in that form, but the commoners never meddled with them. Charles I.
1628.

Objections were suggested to the testimony of the witnesses;—and that the commoners had been called to the election in the first year of James I., *because they contributed to the members' wages*. However, the committee resolved, that "the *commonalty* in general ought to have voices in the election, and that no warning having been given to them the return was void." Right.

YORK COUNTY.

In an inquiry respecting an election for the county of York,* it is expressly stated, that the persons who claimed to vote had 40s. freehold, and were *resiants* within the county upon the day of the date of the writ. Resiants.

AMERSHAM, &c.

We have seen before, in the reign of James I., that three places in Buckinghamshire, *Amersham*, *Marlow*, and *Wendover*, and also *Hertford*, were resummoned to send members to Parliament, upon proof of their having anciently returned burgesses. The same occurs in the fourth year of this reign upon similar proof, and it was said that "boroughs did sometimes send, and sometimes forbore, in respect of poverty, not being able to pay the burgesses' wages. By the writ, every ancient borough ought to send; and the bounds of these were like ancient boroughs, and they paid burgrave rents—and tenths as boroughs, and not fifteenths, and therefore ought to send burgesses." The committee decided accordingly; and that the long discontinuance was no loss of the right:—for it was not a *franchise which could be lost*, but a service pro bono publico; and thereupon writs issued, and the elections were by the *inhabitants*:—which is a parliamentary usage to show that the *inhabitants* were the burgesses. Boroughs restored.
1628.

Inhabitants.

* 1 Journ. 884.

Charles I.

BOSTON.

1628.
Select
body.

A question occurred in the same year,* with respect to *Boston*, whether a *select number* or the *commonalty* ought to choose, and it was agreed by the committee, “*that the election of burgesses to Parliament in all boroughs did of common right belong to the commoners, and that nothing could take it from them but a prescription, and a constant usage beyond all memory.*”

Right.

And it was decided that the right at Boston rested in the “*commonalty*,” and not in the mayor, aldermen, and common council; and the member who was elected by a majority of the *commonalty* was seated.

Burgesses.

Here again the *commoners*, and the *commonalty*, who are the *inhabitants*, are declared to be the *burgesses*.

WARWICK.

1628.

Select
body.

An inquiry also occurred with respect to the election for *Warwick*,† whether it ought to be made by the mayor and *common council*, or by the *commoners* in general. Two hundred of the *commoners* *disclaimed* to have any right of election; but it was *refused to be accepted by the committee*, because if but one *commoner* appeared to sue for his right they would hear him—and the committee again decided, that the right of election belonged to the *commonalty*.

Right.

Tonnage,
&c.

The disputes as to *tonnage* and *poundage* between the king and the House of Commons; and the strong measures adopted by that body, brought the sessions to a close:—and the king, who had suffered so much from the conduct of the Parliament, seems to have determined not hastily to resumon it.

This drove him to the necessity of finding other modes, than by the supplies, of raising money; and those which he adopted, unfortunately, wanted the sanction of legal authority. Some funds were raised by granting indulgences from the necessity of being knighted, for which compositions were paid. Monopolies also were revived by the erection of new

* 1 Journ. 893.

† 1 Journ. 907.

companies and corporations, under the exception made in the statute of James against monopolies, in favour of new inventions; but it is said, by Lord Clarendon, that from all these sources the king obtained no more than 1500*l*. Charles I.
1628.

The court of Star Chamber also extended its authority, and some revenue is said to have been raised by heavy fines inflicted by that tribunal. Loans were adopted from the ministers and courtiers, and from the city of London:—nor was the coining of base money omitted. And to sum up all the grounds upon which the commons and country took offence, though, considering its application, no injury, beyond that important consideration of infringing the principles of the constitution, was inflicted—"ship money" was imposed.

With these precarious, illegal, and unconstitutional sources of revenue did Charles succeed in supporting his government for many years.

The king at last was driven by his necessities to call a new Parliament; and after eleven years' intermission, and the trial of many irregular methods of taxation, in the 16th year of his reign Parliament was resummoned. 1640.

The king directed the Houses to be informed that he had contracted a debt of 300,000*l*. for the support of the army, and which he had charged upon his crown lands.* He therefore urged the necessity of an immediate grant of the supplies, alleging that he had not expended any money uselessly, by unnecessary pomp, or any other kind of magnificence; that what had been levied on his subjects, had been employed for their benefit and preservation; and that though he was desirous of obtaining immediately these supplies, yet he had no inclination to preclude them from their right of inquiring into the state of the kingdom, or to present to him petitions for the redress of their grievances.

He added, that the Parliament of Ireland had twice confided in his good intentions, and, granting him a large supply in the beginning of the session, had experienced the good effects arising from the confidence reposed in him.

These topics, however, made but little impression on the

* 2 Journ. 13.

Charles I. House, which, consisting of gentlemen over whom the crown
 1628. had no influence, it was extremely difficult to manage.

A few days after the meeting of Parliament,* three heads of grievances were stated, which embraced the leading points of the liberty of Parliament—the preservation of religion—and the conservation of the liberties of the kingdom.

However, we shall again quit these subjects of general politics, and adhere more closely to the precise object of our inquiry.

MICHELL.

1640. Soon after the meeting of the House,† a question arose as
 Select body. to the election of *Michell*, in Cornwall, whether the burgesses alone had the right of election, or the burgesses and *inhabitants*. The report is not very distinct as to the decision
 1700. between the parties, but in a subsequent inquiry the right
 Right. appears to have been fixed in the burghers *and* inhabitants paying scot and lot.

The portreeve was chosen at the *court leet*, where the elizors and jury appointed him the returning officer.

In substance, this decision also declares the *inhabitant*
 Burgesses. *householders* to be the *burgesses*.

EAST GRINSTEAD:

Burghage holders. As to *East Grinstead*, the petitioners contended, that the right of election was to be in the *burgage holders only*.‡ On the other hand the sitting member affirmed, that the *inhabitants*
 Inhabitants *tants* had the right as well as the burghage holders, and produced indentures to prove it. The committee were of that opinion, and confirmed the sitting member.

1670. The right of the inhabitants was again established in the 22nd of Charles II. Notwithstanding which, however, at subsequent periods,§ the right was limited *only* to the *burgage holders*.

1640. Another place is reported at the same time, though its name is not mentioned, as having a right of election in the

* 2 Journ. 5.

‡ 2 Journ. 10.

† 2 Journ. 10.

§ 1689, 1695, 1769.

inhabitants paying scot and lot, and that it was not confirmed by prescription to the ancient burgesses.* Charles I.

HONITON.—ASHBURTON.

Honiton and *Ashburton*, neither of which were mentioned as boroughs in Domesday, were this year restored to the right of sending members to Parliament.† The latter having before returned in the 26th of Edward I., and it was stated they were still boroughs, and paid the charge of boroughs—tenths and not fifteenths—as Great Marlow did.

MALTON.

The history of *Malton* is peculiar. It sent burgesses to Parliament from the commencement of the returns by boroughs, in the 26th of Edward I., but it intermitted for many years, until the order of the House for Malton as well as Allerton to send members. Its usages and customs were compiled in the reign of *Queen Elizabeth*, and are stated to have been used from time immemorial. From them it will be seen who were the burgesses; and that they assembled twice a year at the *court leet*, where the “commonalty” of the *suitors* elected all their officers, and regulated all the concerns of the borough, with the assistance of a jury. 1297.
Customs.
Leet.

Malton being one of the burgage tenure boroughs, will justify the insertion of a short history of that place, and of some of its customs, the similarity of which with the customs of the Cinque Ports,‡ and the privileges of Manchester, cannot fail to strike the reader.§

These customs of Malton were claimed by the burgesses in 1596, as granted to them from the first foundation of the borough by their lord. Customs.

That there was granted to the *burgesses* a piece of waste ground, on either side of the town of New Malton, to the intent that the *burgesses* and their successors should always therein get stone and earth, for buildings within the town. 1596.

* 2 Journ. 14.

† See before, p. 532, et seq.

† 2 Journ. 36.

§ See before, p. 541, et seq.

Charles I. That they should have four *ports*;—that is to say, four
 1596. gates;—and the walls of the borough, together with all profits of the walls, towards the mending of the same; and the *burgesses* have evermore been accustomed to feed their beasts in those wastes.

That the *burgesses* should have *common pasture* for all their beasts, without any stint, with free entry and going out to the moor, by a large open way, the which is called “the *outgang*,” and the pasture and the outgange was granted and given to the *burgesses*.

That the *burgesses* should have a *free court*, to be holden within the borough; and that they should have two bailiffs and two under bailiffs, and one burgess clerk, *resident and bydeing within the borough*, for the holding of the court, and
 Jury. the burgess clerk to be of their own *free election*, by 12 *sworn burgesses*, by their faith that they made to the lord and to the commonalty of the borough; and that no other bailiff should make any *attachment* or summons within the borough, without the bailiff of the borough that is sworn. And
 Excludes the sheriff. that no distress made within the borough should be removed without the liberty thereof.

Courts. That the burgess should make out *two suites** by the year to the court, that is to say, at the great court next after the feast of St. Michael, and at the great court next after St. Hilary day; except they have prisoners to deliver, or judgment to be given on any plaint: and they should have their eight days of summons; and at all the aforesaid courts the *burgesses* might *essoyne* once or twice; and if they made a default, and appeared after the second *essoyne*, they should be amerced 4*d.* and no more.

Burgage. That there should no other court be holden within the liberty of the burgage, except the *court of burgage*.

That no *burgess or other man who dwelt within the borough*, should sue another, but only in the court of the borough. And if any burgess of the borough be sued by any man of the country, or by any neighbour of the burgess, the burgess should have his eight days’ respite. And if so be that he

* These are clearly the court leets.

come into the court on the first day after he be attached, ^{Charles I.} and ask eight days from that day, he should have his delays, ^{1596.} that is to say, two essoynes after every appearing. And the same should extend as well to the plaintiff as to the defendant, in all manner of plaints, whether of debt or trespass, or plea of land.

And if any *burgess* of the burgage sued his *neighbour of the same town, not being a burgess*, or any man of the country, they should have court from day to day with delays, that is to say, two essoynes, as well the plaintiff as the defendant. And if so be that he appeared not after the second essoigne, then should the essoigne be turned into default, and he should be amerced by the affeering of 12 men.

That if *any man who dwelt within the borough, as well a foreigner as burgess*, should be summoned or attached to any court without the borough, or to the *wapentake*, the bailiffs or sub-bailiffs of the borough, or any minister of the lord, having letters patent of the lord, should come to them that hold the court or wapentake, on the first day of summons or attachment, and *ask the privilege of the borough*, and he that held the court of wapentake should grant it, so that right judgment be done to every man.

That judgment of all manner of plaints and considerations in the borough court, should be given and judged by the suitors of the court; and all ameracements affeered, except ^{Suitors.} only the ameracements of the commons, and assise of bread and of all other transgressions that touched the lord's person.

That all *burgesses* of the borough should be *free* of all ^{Toll.} *toll* of the lord, in all manner of merchandise; but if they be associate with any foreigner or stranger, then the foreigner and the stranger should give toll, as well for the burgess as for himself, &c.

That they should have a free *prison* for all manner of evil ^{Prison.} *doers* that are taken within the borough, in order that in *their court*, by the COMMONALTY* of the *suitors* they might judge the prisoners or misdoers, and deliver them. And the

* I. e. The commonalty of the suitors at the court leet.

Charles I. burgesses should ordain a *pillory* and *stocks*, lawful and strong.
1596.

Tourn. That the burgesses of the borough should answer before the justices of the peace in all sessions and inquiries, with 12 chosen of the same. And also before the sheriff in his *tourn*, holden within the liberty of the borough, and in no other place: and that the burgesses should there make a *pannel of the 12 men*, which pannel should be *presented* and delivered before the justice or the sheriff, by the bailiff or sub-bailiff of the same burgage.

That the burgesses should have liberty to grind their corn and their malt at the lord's mill.

Two courts. That they should have in the mill two millers and one page, chosen by the assent of *the commonalty of the borough*; the which millers should be *sworn* in the court at two times in the year, that is to say, at the *two head courts of the commonalty of the borough*.

Commonalty. Also it is used, that all manner of measures of the mill, wherewith they take maulter, should be proved in the *said court of the borough*, by the bailiff, *two times in the year*; and there should be no miller removed from the mill without the *assent of the commonalty of the borough*; and no miller should be put into the mill, without the *assent of the commonalty*; nor any minister be put in the mill before that he be sworn to be true to the *commonalty*.

That all the *burgesses* of the borough, and *all that dwell within it*, might grind their corn and their malt which they buy in the country, or in the market wheresoever they will, without any impediment, so that their corn and malt be consumed within their houses.

Common seal. That the burgesses should have the standard of weights and measures proved before the bailiffs and the *commonalty of the borough*, and marked, and the standard sealed with the *common seal*,* and the mark should be kept under the seals of four burgesses chosen for the same intent.

Two courts. That all manner of bakers and butchers should be sworn

* Common seal; and yet Malton does not appear to have been then incorporated.

twice in the year, to the *commonalty of the borough*; that Charles I.
is to say, at the two great courts. 1596.

That the *burgesses* should choose in their court, two *ale-* The proper duty of the leet.
lasters.

That every *burgess* should give to the lord one time in the Shows that the bur-
year, a *fee farm* rent for *his tenement*, called *gassteage*; gesses were
that is to say, for every tenement that hath one door, a house-
penny; if so be it be letten to farm to the court of the holders.
borough, after the feast of St. Michael; for every house
that is letten to farm that hath two doors, two pence in the
year to the court; and for every toft that is not builded, one
penny by the year, except they be tenements of the knight's
fee, or of the prior of Malton, the which give nothing to the
lord. And if so be that a burgess appropriate tenements
lying together, or hold them to his proper use he should
give but one *gassteage* to the lord, as it were for one tene-
ment.

That any burgess having divers tenements to his own use
in divers places, or if he make of one tenement divers tene-
ments, with divers tenants *dwelling* in them, he should Dwelling.
give a whole *gassteage*. And it is lawful to every burgess
to sell his tenements, or to give them, or to will them in his
testament, without impediment of the lord, or of the bailiffs.
And the *lord of the fee* should not have, nor never had, the
ward of the heritage of any burgess of the borough: and
should never claim any thing of the heritance, but only the
faith of his tenant for his tenements on his land, after the
decease of his predecessors.

In the 28th of Charles II. there was a petition by the 1675.
inhabitants of the town.

And in the first of James I., there was another petition by 1685.
the bailiffs, burgesses, and *inhabitants*.

There was also a petition by which the burgesses who were 1708.
electors, complained that several persons were polled, who
did not pay *scot and lot*, and that others, *living without the* Scot and
borough, pretending to be freeholders, were also allowed to lot.
poll. Non-
residents.

Notwithstanding the numerous petitions from this place,

Charles I. there is no resolution with respect to the right of election.
 By some contrivance, however, notwithstanding all the usages and customs of the place, as detailed in the reign of
 Leet. Queen Elizabeth, which referred to the "*court leet*," where the bailiff or returning officer was then elected, yet the right
 Burgage holders. was only exercised by the *burgage holders*—an usurpation no doubt founded upon the mistake we have pointed out before, of confounding the *resiant householders*, or *actual occupiers* of the houses with the *tenants in fee*.

SEAFORD AND COCKERMOUTH.

Seaford also, in the county of Sussex, was in like manner restored in 1640, as well as *Cockermouth*, in the county of Cumberland.*

WINDSOR.

1640. We have before seen† several changes in the right of election for *Windsor*.‡ It was in this year, the 16th of Charles I. that it was decided—upon the question whether the *inhabitants* in general, or the particular choice of the mayor, bailiffs, and some few of the town, should prevail—that "*all the inhabitants* have generally the right of election:"—the *charter of Edward IV. being treated as an incorporation of the inhabitants*.§ And it will be remembered, that charter is in the same form as many we have quoted in the subsequent reigns of Queen Elizabeth and James I.||

MALTON AND NORTHALLERTON.

These places, in Yorkshire, like Honiton and Ashburton, in Devonshire, were also restored to their right of returning members, upon an inspection of the records which related to them.

Thus, notwithstanding the experience of James I., and his declaration of the difficulty he had found in managing the boroughs which then returned members to Parliament,

* 2 Journ. p. 78.

† 2 Journ. 47.

‡ See before, p. 131, et seq.

§ See before, p. 127.

|| 2 Journ. p. 49.

Charles I. had at this time, either sanctioned or submitted Charles I.
1640. to the restoration of no less than eight boroughs; two in the fourth year of his reign, and six in this year; of the latter three were in the north, and three in the south:—adding altogether 16 members to the House of Commons.

This course had been first adopted by Henry VIII., and afterwards followed by Queen Mary, Queen Elizabeth, and James I., in the beginning of his reign. Those however, which were now restored, appear rather to have been adopted by the commons themselves, owing to the practice which the crown had before sanctioned, for the purpose of increasing their own power against the crown.*

In six of the eight boroughs, the burgesses were defined to be the *inhabitant householders*; the right of election being decided to be in them. In the other two cases, Malton and Northallerton, the right was determined to be in the *burgage holders*; and in the latter, the inhabitant householders were joined with them. Upon these two decisions we have before remarked.

STATUTES.

In the same Parliament in which these transactions 1627. occurred, seven and thirty statutes were passed:—one sud- 37 statutes denly brought in and carried through its stages with great unanimity and rapidity, to prevent the inconveniences by the adjournment of Parliament. It was only temporary, but it unconstitutionally provided, that the Parliament should not be dissolved, prorogued, or adjourned, without their own consent. Another for granting the subsidy of tonnage and poundage; and another for the speedy provision of money for disbanding the armies, and for settling the peace of the two kingdoms of England and Scotland.

The 10th chapter was for the important purpose of regulating the privy council, and taking away the Star Chamber. 1640
Star
chamber. This statute recited some of the clauses of Magna Charta. The 5, 15, 28, 36, and 42 of Edward III., the 3rd of Henry VII., and the 21st of Henry VIII.; and on the ground that

* Parl. Hist. vol. xxi. p. 212.

Charles I. all matters examined in the Star Chamber might be redressed *by the common law*, the Star Chamber, and the court of the President and Council in the Marches of Wales were abolished, and no other court was to exercise their jurisdiction; and neither his majesty nor his privy council were to have any jurisdiction over any man's estate, but that the same ought to be tried and determined in the ordinary courts of justice, and in the ordinary courts of law.

Inhabitants There was also another statute for securing the monies to the *inhabitants* of the county of York, and other adjoining counties, for the billeting of his majesty's army, &c.

Ship money. Another act declares the proceedings touching ship-money, to have been unlawful and void: and vacates all proceeds and records concerning it; specially reciting the proceedings against Hampden.

Another statute provided against the encroachments and oppressions in the *Stannary Courts*.

Another fixed the limits and bounds of the *forests*.

And another regulated the *clerk of the market*; an office of which such frequent mention has been made in the charters.

Knight-hood. And to prevent for the future the exactions of any compositions for exemptions from taking knighthood, it was provided that none should be compelled for the future, to take the order of knighthood, nor be fined for not doing so.

Some provisions for the better government and regulation of Ireland close the sessions.

1640. The important bill for triennial parliaments, which is not printed in the statutes at large, passed in this session, after two conferences between the lords and commons,* and they both thanking his majesty for giving his assent to it.

GATTON.

It has been before remarked, upon the decisions of the committee, reported by Glanville, that the qualification, as to the common law right of election in favour of *prescriptions*, was untenable, inasmuch as no such prescriptions had ever existed.

In the case of Gatton,† which occurred in the 17th of

* 2 Journ. 286.

† 2 Journ. 303.

Charles I., that question arose. The point in dispute was, ^{Charles I.} whether the *burgesses* by common right, had the power of election; or the *freeholders, dwelling out of town*, who had freeholds in the town, by virtue of a particular *prescription*. 1641.
The committee were of opinion that there was in this a prescription which was good against the common right.

It appeared in evidence that a return, in the 33rd of Henry VIII., was made by Roger Copley, who is described in it as a burgess and inhabitant who, by virtue of a precept to him directed, had made the return, and therefore was, in his own person, both the returning officer and the elector.

It was also given in evidence, that in the first and sixth of Edward VI., the returns were made by the *inhabitants and burgesses*; but in the tenth of James I. a precedent was shown on behalf of the *freeholders*.

Some other matters, not material to our inquiry, were discussed, but it was resolved that there was no sufficient proof of a prescription against the common right, and therefore the candidate who had at the election the smaller number of votes, was declared duly elected; and the contrary was decided as to the other candidate who had a majority of votes, but the greater portion of them were freeholders *dwelling out of the borough*.

In this instance, therefore, we see the decision of the committee against that prescription which had been referred to in the decision in Glanville's Reports, in the time of James I.

And most properly, because *Gatton clearly was not a borough by prescription*. It is not mentioned as such in Domesday; there are no other documents to show that it was a borough before the time of legal memory, and it returned no members to Parliament till the 29th of Henry VI., in the 38th year of which reign, and in the 7th and 12th of Edward IV., it had. It also returned members; as well as in the 27th year of Queen Elizabeth; at which time the circumstances connected with this borough are somewhat curious. 1584.

Charles I. The following letters are to be found amongst the Harleian

1584. Manuscripts:—

“After my very hearty commendations.—Whereas there are to be returned by you, against the Parliament, two burgesses for Gatton, in that county of Surry, which theretofore have been nominated by Mr. Coplie, for that there are *no burgesses in the borough* there to nominate them. Forasmuch as by the death of the said Mr. Coplie, and minority of his son—the son with his lands are within the survey and rule of the court of ward whereof I am his majesty’s chief officer, you shall, therefore, forbear to make return, of and for the said town, without direction first had from me therein, whereof I pray you not to fail, and so I bid you heartily farewell.

“From the court at St. James’s, this 13th of November, 1584.

“Your very loving friend,

“W. Burghley.

“To my very loving friend, Walter Covert, Esq., sheriff of the county of Surrey and Sussex, and to his under-sheriff, or to other persons.”

And a few days afterwards the following letter was also written:—

“After my hearty commendations.—Whereas in the indenture returned for the borough of Gatton, in the county of Surrey, Mr. Frauncis Bacon, and Mr. Thomas Bushoppe, are nominated burgesses. Forasmuch as Mr. Frauncis Bacon is returned also for another borough, and so certified and sworn, you shall appoint in his room and place Edward Browne, Esq., and so to certify him with Mr. Bushoppe; so fare you well.

“From the court, this 24th of November, 1584.

“Your loving friend,

“W. Burghley.”

1587. In the 30th of Elizabeth, the return was by the *burgesses* and *inhabitants*.

In the 18th of James I., the case of Gatton was before a committee of the House, and a report was made, from which it appeared that the precept had been sent to the *constable*, the principal officer of the town, but was delivered to the minister, who announced the following Wednesday for the election.

Mr. Copley and some of his lessees made their choice the Tuesday before—the freeholders making their choice on the Wednesday; and this being confessed to be true, all the committee were of opinion that it was not a true election, and that the return was void.

A heated discussion, in which Sir Edward Coke held a conspicuous part, afterwards took place, in the course of which it appeared, *all the freeholders except one dwelt out of the town*, and only held of the manor within it; that the election was made at Ryegate; and, upon a division, there was no voice in support of the election, but a general vote against it; and there was a proposal that there should be no new election, in respect of the danger from the lord of the borough; but, in conclusion, the two candidates who stood on the votes of the freeholders were confirmed in their seats.

It is also stated, upon the Journals of the 18th of James I.,* that the writ for Gatton was directed to the *burgesses*, and delivered to Mr. Copley—that the town consisted only of seven houses—and that all but one were his tenants—that the election by them was good, and that they agreed upon their election in Gatton, and sealed it casually in Ryegate.

However, the reader has already seen what was the decision of the committee in the 17th of Charles I. on this point, which militates against this determination, but was, in effect, supported by that which occurred in the fourth of Charles I., about eight years after the inquiry in king James' time. Upon that occasion, Mr. Hackwill reported from the committee of privileges,† that there were two indentures for Gatton—one by the *inhabitants*, the other by Mr. Copley solely;—that *Mr. Owfeild and Sir Charles Howard* were

* 1 Journ. 512.

† 1 Journ. 876.

Charles I. returned by the *inhabitants*—Sir Thomas Lake and Mr.
 1628. Jerome Weston by Mr. Copley, who insisted that, as sole inhabitant, he was entitled to return, as had been done before in the 33rd of Henry VIII., and in the first, second and third of Queen Mary.

On the other part it was insisted, that in the seventh Edward VI., Mr. Copley, “*et omnes inhabitantes*,” returned. And in that of the 28th and 43d of Elizabeth and the first and 18th of James I. the return was made by the *inhabitants*. And that in all the latter parliaments Mr. Copley joined with other inhabitants in the return.

Mr. Copley in reply urged, that it had been resolved by the former committee, that those who had lands in their own manurance, although they dwelt out of the burgh, were entitled to vote. The return of Sir Charles Howard and Mr. Owfeild was held to be good; and the other of Sir Thomas Lake and Mr. Weston was void, and to be taken off the file; so that the return by the inhabitants was supported against that by Mr. Copley.

1697. In the eighth of William III., the election of Gatton was again before a committee. It was insisted for the petitioner, that the right of election was in the *inhabitants not receiving alms*, and in the freeholders of the borough, having such freehold in their own occupation; and that upon the poll the petitioner and Mr. Evelyn had each 11 voices: but it was insisted on behalf of the petitioner, that several who voted for Mr. Evelyn were not qualified; and that four who had a right to vote, and would have voted for Mr. South, were denied.

For Mr. Evelyn it was insisted, that the right of election was in the freeholders of the borough, and *inhabitants paying scot and lot*.

And the committee resolved in favour of Mr. Evelyn.

Prescrip- Thus, even taking the qualification in favour of *prescrip-*
 tion, tion, as laid down by the committee in the reign of James I. to be correct, yet in this instance the prescription was decided not to exist. Nevertheless the freeholders were held

entitled to vote, contrary to the common right, but the *inhabitant* householders were likewise permitted to share with them in the election. Charles I.
1696.

The right thus established—or in other words, *these qualifications for burgess-ship*—are open to many objections. Freeholders.

First.—The freeholders' right was contrary, as we have shown from the commencement of this inquiry, to the principles and practice of the common law.

Next it introduced *non-resident* burgesses, which was contrary to the whole principle and object of our municipal institutions; as well as to the law connected with parliamentary representation. Non-residents.

Again it placed the whole control of the borough in the hands of the owner of the soil, who, by creating *non-resident* freeholders, had the means of entirely out-numbering the inhabitants of the place.

There was also another objection, which might indeed be made in all places where the *inhabitants* had the right of election, were there not in the constitution some principle which would operate as a correction of the abuse. Inhabitants

It would be in the power of the owner of the borough to destroy the houses to such an extent, that the *inhabitants* might be reduced to the smallest possible number.

In this instance of Gatton there existed only one. In Old Sarum, there were none.*

It is *impossible to conceive that this could be any part of the constitution of England*. It therefore becomes necessary to ascertain what is the principle which would prevent so obvious an abuse. The history we have given affords an easy explanation of the corrective principle. Jurisdiction separate from the sheriff was the real foundation of the borough. Whenever, therefore, the number of inhabitants in the place was so reduced as to take away the necessity for such a jurisdiction, and there were not means of carrying it on by a sufficient number of inhabitants to fill the offices, Borough.

* It appears from the Indentures of Return at the Rolls Chapel, that in the first year of Queen Mary, Sir Nicholas Throckmorton, and John Throckmorton, Esq., "Burgenses de Castro Vetric Sarum," elected themselves "pro nobis et nomine nostro et nomine totius burgi predicti."

Charles I. and perform its functions—as bailiffs—portreeves—jurors—constables, &c., then the borough, by operation of law, was dissolved, and became again a part of the county. So easy a solution may be afforded of the apparent paradox in our constitution, in the existence of such places as Gatton and Old Sarum.

Old Sarum. With respect to the latter place we find that it was of great antiquity, having been a British settlement prior to the time of the Romans, and was the residence of some of the Saxon kings. Alfred strongly fortified it, and in 960, Edgar held a council, to deliberate upon measures for the prevention of the Danish aggressions. In 1076, the episcopal see of Sherborne was removed to Old Sarum, and Bishop Herman founded the cathedral, which was completed by Bishop Ormund in 1092.

In 1095, William Rufus held a council here, and Henry I. made it one of his places of residence. From the time of Stephen to that of Richard I., so serious were the disputes between the clergy and the castellans, that Bishop Herbert obtained permission from the pope to lay the foundation of another cathedral at Salisbury, where the episcopal see was removed, which caused the immediate decay of Old Sarum.

But it is not mentioned in Domesday, nor does any charter appear to *Old Sarum* prior to the 13th year of Henry III., when a grant of only five or six lines, giving to the *burgesses* a *merchant guild*, and all the liberties and customs which the citizens of *Winchester* had, confirm charters of Henry I., Henry II., and John, to which it refers; but they do not appear on the charter rolls. It returned members to Parliament in the 23rd of Edward I.:—intermitted till the 34th of Edward III.: after which it constantly returned. Its members were, like those of many other boroughs, returned in the reign of Henry V. in the county court.

1688. At the Revolution, the right of election was decided to be in the *freeholders being burgage-holders* which, for the reasons we have given before in the cases of *Malton* and others, was not justified by law; and in truth, was the real founda-

Right.

tion of the subsequent abuses in this borough, under which Charles I.
the right was exercised by *non-resident freeholders*, although
there were no inhabitants to be the burgesses of the place.

In 1705, it was *agreed*, that the right was in the *burgators*, 1705.
it probably being the interest of both parties on that occa- Interest.
sion, as we have frequently remarked before with respect
to other places, to support that right; and therefore it was Right.
again decided, that the right was in the *freeholders being*
the burgage-holders of the borough.

It appeared that one of the voters had taken possession
of his freehold on the day of his election, which may be
remarked as one of the abuses arising from the burgage
tenure right of voting. The party had received no rent, and
had only given his note for the purchase money. And traces
appeared of the *burgages* being split; though in a subsequent
time it appears that the policy was to keep the freeholds in
as few hands as possible.

In Lord Lovelace's case* it was said, that "no place could 1632.
"be exempt totally from the king's laws; and that a grant
"from the king to exclude his officers from such a place is
"void, if *the king do not appoint some to do justice there.*"

This principle shows, that the observations we have before
made, with respect to Gatton and Old Sarum, were correct,
that when they ceased to have a sufficient number of inhabit-
ants to constitute a court, they could no longer be boroughs
or places with distinct jurisdiction exclusive of the sheriff.

We have before seen, from the reign of Edward IV. up-
wards, the interference with the elections by some of the
considerable men of the country.† And the commons had
lately, in opposition to the king, resorted to the measure
before adopted by the crown, of resummoning ancient bo-
roughs to send members, to increase the numbers in the

* Sir William Jones, et etiam, 283.

† See before, p. 1008. And in the 26th Elizabeth, it appears in the indenture of re-
turn, at the Rolls Chapel, "That the wardens and burgesses of St. Ives, with the con-
sent of the Right Hon. William, Marquis of Winchester, and William, Lord
Mountjoye, chief lords of the town and borough," elected the burgesses for this bo-
rough in Parliament.

Charles I. House. But the commons, who had taken this course, became jealous of the interference of the peers with the election of their members, and therefore, in the 17th of Charles I., made the following order : * “ Whereas the House of Commons has received information that letters from peers are “ directed to boroughs that now are to make elections of members to serve in this Parliament ; they conceive that all letters “ of that nature, from any peers of this realm, do necessarily “ tend to the violation of the privileges of Parliament, and the “ freedom of the election of the members that ought to serve in “ the House of Commons. And do declare, that notwithstanding such letters, all persons to whom elections of knights and “ burgesses do belong ought to proceed to their elections with “ that freedom which, by the laws of the realm and of right, “ they ought to do, and do expect, that if any such letters from “ any peers of the realm shall hereafter be sent unto them, “ that the parties receiving the same shall certify the contents “ thereof, or bring the letters themselves to the speaker of the “ House of Commons.” †

Court leet We have shown, in a previous part of this work, the manner in which the pure practice of our ancient constitution was by degrees superseded by the neglect of the *court leet*—by the substituting for it the court baron, with the introduction of abuses in its administration, which the law might with the greatest ease have prevented, repressed, or punished. But, on the contrary, they were allowed to proceed unheeded, and the following extract from the Journals will establish, on the one hand, that the *court leets* were still in practice at this time—that the abuses were gradually increasing ; and the courts of law had so long neglected their progress, that Parliament at last, to a certain extent, usurped their functions, and made this order, which might have been more appropriately issued by the Court of King’s Bench.

* 2 Journ. 337.

† The interference also by warrants or letters to high constables or other officers, to be communicated to the freeholders or other electors, or threatening the electors, was also, in 1670, declared to be unparliamentary, and a violation of the right of election.—9 Journ. 191.

"The humble petition of the mayor and burgesses of *Taun-* Charles I.
ton, concerning some misdemeanours and abuses committed 1642.
 by the *steward* of the *leet court* of that town, (the manor Taunton.
 thereof belonging to the Bishop of Winton,) in nominating
 and packing of *juries*.*

"Upon a complaint made to this House, that the *steward*
 of the *leet court* of the manor of Taunton Deane had com-
 mitted some misdemeanours in requiring the bailiffs of that
 town, by his warrants, to return at the last leet the names of
 such persons only as were nominated by himself, by means
 whereof a jury was compacted of unfit persons, the which
 course may favour of an ill precedent, and of ill consequence
 to the peace of the kingdom. It is ordered, that the steward
 do issue out his warrants at the next court leet in the usual
 manner, as by the custom of the place he ought to do. And
 that the bailiffs do make returns of the jurors in the ancient
 usual manner. And that the steward do forthwith attend
 this house to answer for his former misdemeanours."

In the 19th of Charles I., one return was made for *Tewkes-* 1634.
bury by the *bailiffs* under their *seal*, and another by the *in-* Tewkes-
habitants.† bury.

The committee avoided the election of the member who
 was returned by the former, and seated the one who was re-
 turned by the latter.

The house also took upon themselves to make an ordi- 1645.
 nance‡ for disfranchising several aldermen and common
 councilmen of the city of *Bristol*, for having nominated a Bristol.
 mayor and a committee for settling the government of the
 city; as well as for maintaining the garrison of Bristol; and
 settling the militia there.§

* 2 Journ. 756.

† 3 Journ. 378.

‡ 4 Journ. 319.

§ In the 23rd of Charles I. (1647), the speaker was directed to write a letter to the several cities, boroughs, and corporations, to require such places as had elected any delinquent to be mayor, to proceed to a new election.—5 Journ. 317.

In the next year, the House *allowed* the choice of a person to be one of the bailiffs of *Aldborough* in the county of Suffolk.—6 Journ. 35.

And also directed an *oath* to be taken by every freeman in London and other cities, boroughs, and towns corporate, which it is clear nobody could impose but the king or the legislature.—6 Journ. 137. Though the speaker, in an answer to a

Charles I. In the year preceding, it had been also resolved that Sir
 1644. John Morley should be forthwith disabled from being mayor
 Newcastle or alderman of the town of *Newcastle*; and the House nominated and approved of another person to be mayor, and directed that he should be restored to be an alderman of *Newcastle*.*

They also nominated another alderman, a recorder and a sheriff; and a committee was directed to consider of fit persons to be aldermen in the place of those who had been removed and disabled.

Thus, in these instances, we find again the House of Commons usurping, and even exceeding, the jurisdiction of the Court of King's Bench; and adopting that course of interference with the municipal elections which every person knowing and revering the constitution could not but have deprecated in the crown; and which was much more dangerous when usurped by such a body as the House of Commons than it ever could have been if exercised by the king.

But the House of Commons were at this time rapidly approaching to the unrestrained exercise and abuse of the unconstitutional powers they had assumed.

At the beginning of this year, it was referred to a committee to consider of the orders and ordinances made for the restraint of any persons to go to or from the king's quarters.†

And in the summer of this year they had recognized committees of association and counties;‡ and had directed them to consider the names of the lords and other persons who were fit to be excepted from pardon; and those who were fit to be removed from his majesty's council, and to be

petition from the *inhabitants of the county of Buckingham*, stated "that the House was resolved to maintain the liberty of the subject, and to avoid and prevent whatsoever might tend to tyranny or confusion."—6 Journ. 141. With regard to the imposition of oaths not warranted by the law, the mayor of Bristol, in 1680, was charged with a misdemeanour, because he had called upon the electors to swear that they were freemen, and had not given their oaths before.—9 Journ. 654.

* 3 Journ. 714; 4 Journ. 87; see also as to *Bridgewater*; 6 Journ. 407, and Hull, 7 Journ. 178.

† 3 Journ. 442.

‡ 3 Journ. 594.

disabled from bearing any office thereafter in the church or Charles I. commonwealth—a most unjustifiable interference with the king's prerogative.

Nor is it possible to read the proceedings of the House of Commons at this period, without being satisfied of the daily encroachments which were made by them upon the constitution of the country.

In this same year, the commons took upon themselves to direct,* that a sum of money should be taken out of the revenues of the dean and chapter of Durham, for the maintenance of a preacher at Newcastle-upon-Tyne. 1645.

The lords and commons ordered the lord mayor,† aldermen, and common council of London, to present the name of a fit person to both Houses of Parliament, to be lieutenant of the Tower of London.

The House of Commons also, who had in these numerous instances encroached upon the prerogative of the crown, and who had themselves added 16 members to their House, upon the pretence of resummoning ancient boroughs, still more unjustifiably interfered with the undoubted prerogative of the crown in this respect.

We have before shown that the king, as the head of the executive government, was entitled by his prerogative to Prerogative define the districts within which the law was to be administered; and on that ground, had the power of making boroughs, and separating them from the jurisdiction of the sheriff; the consequence of which would be, that they would have precepts directed to them by the sheriff, to return members to Parliament.

Nor could there be any danger in this prerogative; nor means of its being abused without a prompt remedy for the correction of the abuse.

The proper ground of a charter for such a purpose, would be the *necessity for a local jurisdiction*, in consequence Boroughs. of the *accumulation of population* in any particular place. If honestly granted, it could produce no mischief; if that were not the object, or if, on the contrary,

* 4 Journ. 113.

† 4 Journ. 120.

Charles I. it was with the view of interfering with the privileges of the
 1645. House of Commons, there is no doubt that the advisers of the crown would be responsible for such a breach of duty ; or the sheriff for any misconduct in the exercise of his functions. Thus the prerogative would be reconciled with the safety of the public, by these plain practical principles of our constitution.

But the House of Commons of this period were not satisfied with so reasonable a protection. They took upon themselves the legislative authority, by resolving, that for the time to come, " no new power should be granted by the king to any city or borough, to send any citizens or burgesses to the Parliament of England, saving only by act of Parliament, upon the petition of the House of Commons assembled in Parliament."*

From which, this practical suggestion may be drawn, that as nothing is more desirable for the welfare of the state than that all the functionaries, both public and private, should act together in harmony and good understanding, for the public good :—so it would be desirable for a minister at all times, to take care that this undoubted prerogative of the crown should never be exercised, but upon the petition of the House of Commons ; by which means the privileges of the House would be protected from all possibility of undue interference ; and a good understanding would be maintained between these two important branches of the legislature.

Constitution suspended.

Soon after this period, the House of Commons so entirely assumed to themselves the king's prerogative, and the rights of the House of Lords,† that it is in vain to look for precedents or principles to illustrate the subject of our inquiry ; and it is impossible not to consider the constitution of England as *suspended* for the fifteen years which immediately followed. The violent and melancholy facts which occurred in that interval had better be passed over in silence.

The detail of circumstances even connected with the subject of our inquiry, at this time, would be of no avail.

* 4 Journ. 372.

† 2 Clar. 415.

We shall therefore content ourselves with adding extracts from a few of the law cases which occur in the earlier part of the reign—some few charters and municipal documents as specimens of this period, and with them close our observations upon this reign, as far as regards England, Scotland and Wales.

CASES.

That the *court-leet* was still in use at this time, may be collected from the following case, in the 16th of Charles I. :—

Sir William Hicks was seised of the manor of *Riholl*, in the county of Essex, in which he prescribed to have a *leet*; and Alderman Abdey, one of the aldermen of London, was an *inhabitant* within the precinct of the leet, at which he was presented by the homage to be *constable*. And this presentment being removed by certiorari into the court of King's Bench, the alderman was *discharged, because he was bound as alderman to be present in London for the government of the city.*†

In this case the same error is committed which we have so often pointed out, of confounding the function of the court-leet with the court-baron. The appointing a *constable* is clearly the duty of the former; but the *homage* which is here mentioned by mistake for the *jury*, belongs to the latter.

So also from a case in the same reign, about eight years before, the officers requisite at the court-leet may be ascertained.‡

George Tottershall, Esq. within his manor of Finchampstead, claimed a *leet*. And the attorney-general desired that it might be inquired first, if he had *used it*.

Secondly. If he had an able *steward* to discharge the office. For the want of that also is a cause of seizure.

Thirdly. If he had *officers*, and those things which are for the execution of justice, as *constables, ale-tasters, &c., and pillory, and stocks, and cuckingstool, &c.*

* Sir William Jones, 462. See also, 289.

† Sir W. Jones, 283.

‡ See *Rex v. Poynder*, 1 Barn. & Cres. 178.

Charles I.
1645.

Leet.
1640.

Leet.

1632.

User.

Steward.

Officers,
&c.

Charles I. Fourthly. If he punish bakers more than three times, and
 1632. do not set them in the pillory ; all these are causes of *seizure* till he pay a fine for the abuse and replevy his franchise.

Mr. Tottershall himself being called, and asked concerning his *leet*, confessed that he had not used it a great while, nor were there officers or other things for the execution of justice ; but he said, that it appeared by *ancient rolls* that there had been a *leet* there ; and being asked to what *leet* Tourn. his tenants went, he said they went to the *sheriff's tourn*, and paid *head-silver* there : upon which Mr. Attorney said that Mr. Tottershall could have no *leet*, for *all leets were drawn out of the sheriff's tourn, which is the leet in the king's hand*. And *head-silver* is certum letæ, and no man shall be Certum letæ. *subject to two leets*, and therefore there can be no allowance of the *leet*, unless the king should be put out of that (which for ought we know) he hath ever had. So judgment was given against the *leet* and strays.

It should be also observed with respect to this case, that it establishes the fact, that *when a leet ceased to be held, the place which was before under its jurisdiction, became again subject to the sheriff's tourn, as part of the county*.

1629. In the fourth of Charles I., a *quo warranto* was brought in
 Newcastle-on-Tyne. the Court of King's Bench, against the *mayor and burgesses of the town of Newcastle-upon-Tyne*, to show by what warrant they claimed to be *incorporated*—by what name to have a common council—make ordinances—by penalties tax the *burgesses inhabiting that town*—take money for admitting into their companies—*disfranchise*—hold a court of record—have cognizance of felons—and a recorder—eight serjeants-at-mace—fairs—and markets—and exclude *foreigners from selling there*—have a *clerk of the market*—view of frankpledge View of frankpledge. —and correction of the assise of bread and wine—examination of weights and measures—tumbrel and pillory—with all that belongs to a *view of frankpledge*, &c. &c. &c.

1632. In a case also, in Bulstrode,* in the eighth of Charles I., the reader may find a confirmation of the connexion which we have before noted between *the poor laws and the ancient*

* 2 Bulst. 349.

common law doctrine of inhabitancy; for it will be there ^{Charles I.} seen, that a pauper is described as *dwelling* in the place to which he belonged. And a child is directed to be kept in the parish where it *dwells*.

And in the 10th of Queen Anne, there is also a case in ^{1711.} which the mother of a bastard child is described as an *inhabitant** of the place in which the child's settlement is alleged.

CHARTERS.—BRISTOL.

Charles I., in the fifth year of his reign, granted a charter ^{1629.} to the citizens of *Bristol*, which recited the charters of the 47th Edward III., and the 34th of Henry VIII., and that the *Castle* of Bristol was the king's ancient demesne, and though contiguous to Bristol, the officers of that city had no authority or jurisdiction within it, wherefore it had become the resort of thieves, &c. Therefore at the request of the queen, he had separated the castle from the county of Gloucester, and made it part of the city of Bristol; so that the magistrates, officers, and citizens should have the same rights in the castle as in the city; and that no sheriff of Gloucester should intronit. "And that the men who *dwelt* ^{Dwelt.} "within the castle and precincts for the time being, and "who *abide* in the same place, shall have and enjoy *for ever* ^{Abide.} "all the liberties, &c. had or enjoyed by the citizens or by "the burgesses of the city,† and shall be had, holden and "reported in all things *as citizens and men of the same* "city."

From this charter it is clear that the *castle* was before ^{Castle.} distinct from the borough; and that the persons who *dwelt* and *abode* in it, were to enjoy the same privileges as the citizens or burgesses had before enjoyed. From which ^{Inhabitants} it is impossible not to infer, that the persons who before enjoyed the privileges as citizens or burgesses of Bristol were the *inhabitants*.

The consideration for this charter was 959*l.*, paid by the

* *Rex v. Ideford*, 1 Sess. Ca. 32.

† See before, charter of Edward IV., adding Southtown to Dartmouth.

Charles I. mayor, burgesses, and commonalty of the city of Bristol. And the castle was to be holden in *free socage*, at a rent of 40*l.* per annum, with powers to distrain for the rent, and forfeiture for non-payment, &c.

1636. In this year, 46 burgesses attended and elected the mayor, sheriffs, and other officers.

SOUTHAMPTON.

1626. In the second year of the reign of Charles I., a new charter was granted to *Southampton*, upon a forfeiture of the town's rights, by a quo warranto. But on what particular account these proceedings were had, does not appear. It is only entered in the journals of the corporation, that one of the *aldermen* should ride to London, to solicit the renewing of the charters; and that some of them, concerning the cognizances of pleas, had been in the soli-

1640. citor-general's hands on the 21st of September, 1640. It is

1641. entered that the new charter was openly read in the House.—It commences with reciting, that *it had been a town incorporated beyond the memory of man*, (which we have before seen was not true;) and that the mayor, bailiffs, burgesses, and *inhabitants* had besought the king to confirm all their liberties and customs. Whereupon the king grants that the town should be for ever incorporate, of one mayor, two bailiffs, and of *burgesses*, by the name of “the mayor, bailiffs, and *burgesses* of the town of Southampton, &c.”

Incorporated.

The charter then proceeds at great length to grant a recorder—coroners—define the limits of the town—and grant the town at fee farm, with the port of Portsmouth;—and that the *burgesses* should not pay petty custom—that *Southampton* should be a county of itself, with a sheriff—county court—a staple for recognizances of debts—and that the porters, packers, coiners, &c., should be yearly appointed

Inhabitants

out of the *inhabitants* of the town—that the mayor should have cognizance of pleas, assise of ale, &c. And that *burgesses* against their will should not be put in any jury, or serve any office without the liberties, &c. That the mayor, &c. should have an admiralty jurisdiction. That no mer-

chant, foreign from the liberties, &c., should sell any merchandise within the town to any foreign merchant, &c. Charles I. 1641.

That the mayor, bailiff, and burgesses, and their successors, *inhabitants and residents* within the town, and all *other free* Residents. *burgesses*, who thereafter should be *inhabitants and residents* within the town; and during the time they should be *inhabitants, dwellers, and residents thereof*, should be discharged for ever of rendering or paying prisage, &c. That the mayor, recorder, aldermen, bailiffs, and sheriffs, &c. should be the common council, with powers to make bye-laws, &c.

This charter appears to state, contrary to the fact, that the town had been *incorporated* beyond the memory of man.

It is true, that Southampton was a *borough* long before the time of legal memory,* and that the bailiffs and burgesses had enjoyed many liberties, as well by charter as by prescription, but they were not incorporated till the reign of Henry VI.

PORTSMOUTH.

There is also a charter in the third year of this reign, to 1627. the mayor, burgesses, and *inhabitants* of the borough of *Portsmouth*; which recites that they had been known by the name of the "good men of Portsmouth," "burgesses of Portsmouth," "men of Portsmouth," &c. That they should be a body *corporate*, by the name of "the mayor, Corporate. aldermen, and *burgesses*." That one of the more honest and discreet aldermen of the borough should be mayor, and 12 other honest and discreet *burgesses* aldermen. And that they should have the power of making bye-laws, and hold within the borough a *court-leet*; and that the burgesses and *inhabitants*, as well "present as to come," should be free of toll; and that they should not be impannelled on juries without the borough.

Charles I.

ROCHESTER.

1630. In the fifth year of this reign, there is a confirmation by inspeximus of all the previous charters to *Rochester*:—which recites that certain ambiguities existed in their previous charters; and it was granted that it should be a free city, and that the mayor and citizens might be one body *corporate* and politic, by the name of “the mayor and citizens of the city of Rochester, in the county of Kent.” (The usual corporate powers then follow.) And that there should be from the more honest and discreet citizens, one mayor, 11 aldermen, and 12 assistants—all of whom were to constitute and be called “the common council,” with powers to make laws for the government of the city, &c.

Bye-laws. A recorder is named who was in future to be appointed by the mayor and aldermen. A court of *Portmote* is then granted; and that all writs within the city should be directed to the mayor, &c., and that no justices of the county should *intromit*.

NEW SARUM.

1631. *New Sarum* also received a charter in the sixth year of Charles I., reciting and *confirming* the charter of James I., and granting additional powers and regulations for the election of the corporate officers.

HUNTINGDON.

1630. The borough of *Huntingdon* received a charter from the king, in the sixth of his reign, which commences by a recital that it had been an ancient and populous borough, and in the time of King John had received many liberties and privileges, and was always the only borough-merchant of the county of Huntingdon *incorporated*. And that the bailiffs and burgesses had besought him to ratify their ancient customs.

The king then proceeds to grant that Huntingdon should be a free borough—that the burgesses and *inhabitants*, by whatsoever name or names they had been theretofore *incor-*

porated, should be one body corporate and politic, in deed, Charles 1.
1630.
&c., by the name of "the mayor, aldermen, and burgesses
"of the borough of Huntingdon." The usual corporate
powers then follow.

After which, a recital, that from time immemorial it had
been used and accustomed within the borough that 24 *men*,
inhabitants of the borough, should be burgesses, and of the
common council; all of them having a voice in the business
of the borough. And, that at the humble petition of the bai-
liffs and burgesses for the better governance of the borough,
to prevent and *remove all occasions of popular tumult*,* and to
reduce the elections and public business of the borough into
certainty and constant order, it was ordained that 12 of the
better burgesses of the borough should be called aldermen, Aldermen.
one of whom should be named mayor. That the mayor, re-
corder, and aldermen should be called the common council
of the borough, and that the residue of the burgesses should
be assisting to the mayor and aldermen, whensoever they
should be summoned or called. Powers are then given for
the making of bye-laws. Jurisdiction is given over all
real and personal actions arising within the borough. And
it is directed that the mayor should be the coroner and
clerk of the market. That the mayor, aldermen, and bur-
gesses, should hold all lands, &c. whereof they were then
seised, to the use and advantage of the burgesses. A con-
firmation of the *courts-leet*, *views of frankpledge*, courts of Leet.
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or names they had been theretofore incorporated, closes
the charter.

Entries are extant in the borough books, shortly after 1633.
this charter, when it appears that three persons were *admit-
ted* to the freedom and liberty of the borough at the *court-
leet*, and were then *sworn free burgesses*.

Leet.

There is a similar entry in July in the same year; and in
the next, two others are also admitted at the *leet*. In the
following year, five others at the same court, then called the

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ton, &c.

Charles I. view of *frankpledge*:—and in the following year, five others are similarly entered.

It should be observed, that these admissions are made under a charter which is in form and substance precisely the same as all the other charters we have quoted.

CAMBRIDGE.

1633. The borough of *Cambridge* received a charter in the seventh year of this king,* which commences with a recital that it was an ancient and populous borough; that the mayor, bailiffs, and burgesses, had enjoyed divers liberties, &c. from charters and prescription; and that they had petitioned the king to create them by what name or names soever they were then, or were theretofore *incorporated*—or *whether they had been incorporated or not*—into one body corporate and politic, by the name of “the mayor, bailiffs, and burgesses of “the borough of Cambridge.”

Corporate. The king then proceeds to *incorporate them*, granting the usual corporate powers—that one of the burgesses should be called mayor; that 12 capital burgesses should be called aldermen, and should be of the privy council of the borough, as anciently accustomed. That 24 of the other discreet burgesses should be the common council, to be assisting and aiding the mayor.

Also that it might be lawful for the mayor, bailiffs, and
Tax. burgesses, to tax and assess, &c. upon all persons whomsoever, *inhabitants or indwellers* of the borough, (privileged persons of the university excepted) such sums of money as might be necessary for supporting the expences of the borough, &c.

LONDON.

1638. Charles I., in the 14th year of his reign, granted a charter inspecting and *confirming* all those which had been previously granted by William the Conqueror, and subsequent kings of England, to the city of London.

Justices. And also granting that the mayor, recorder, and aldermen,

* 1 Lut. 403.

who had passed the chair, and the three senior aldermen Charles I.
1638.
who had not passed the chair, should be justices, &c.

That the mayor and commonalty should have all recognizances forfeited, concerning *inmates* dividing their dwelling Inmates.
houses into several habitations—with a grant of all fines, &c.,
except those that were royal.

That the *widows* of freemen might carry on their husbands' Widows.
arts and occupations in the city, notwithstanding the statute
of apprentices.* That no market should be kept within seven
miles of the city; that the customs should be certified by
word of mouth by the recorder; that the mayor should
nominate to the chancellor two aldermen, one of whom should
be justice of the peace for the county of Middlesex, and the
other for the county of Surrey.

The citizens of London likewise received another charter
from the king, in the 16th year of his reign, granting them
scavage and water bailage.

DEVIZES.

The king, in the 15th year of his reign, granted a charter 1640.
to *Devizes*, which confirms the charter of James I., but
makes new provisions for the election of the municipal
officers.

KIDDERMINSTER.

Pursuing the plan we have adopted in the former reigns, 1637.
we shall also give one specimen of a charter, to a place which
did not at that time return members to Parliament.

It is the following grant to Kidderminster, which is precisely similar to those to places which returned members to Parliament. And it will be difficult to explain why Kidderminster, which was a *borough*, and had a *court leet*, had not been summoned to return members since the reign of Edward I.

This borough received a charter in the 12th year of this reign, which recites that it was an ancient borough, and that

* 5 Elizabeth.

Charles I. the *good men* of the borough had enjoyed liberties from charters and prescription.

1637. That the *inhabitants*, for the good government of the borough, had petitioned that the *good and lawful men, inhabitants* there, might be created anew into one *body corporate* and politic. Whereupon the king proceeds to grant that the village and borough of Kidderminster should be a free borough, and that the *good men and inhabitants* should be one body corporate and politic, by the name of "the bailiffs and *burgesses* of the borough of Kidderminster."—The usual corporate powers then follow. And that there should be one bailiff, 12 of the better and more honest *burgesses* of the borough to be capital *burgesses*, all of whom were to be the common council, with powers to make bye-laws, &c. .

Corporate name. That the bailiffs and capital *burgesses* might elect 25 men *Inhabitants* of the more honest and better sort of *inhabitants residing within the borough*, who should be called assistants or aiders to the bailiffs, &c., in all things touching or concerning it.

Lect. The charter terminates by reserving all the rights and privileges of the lords of the manor to the *court leet*, &c.—fairs, lands, tolls, markets, customs, &c., which the *burgesses* and *inhabitants*, or the bailiff, *burgesses*, and *inhabitants* of the borough had held, by whatsoever name or names of *incorporation*, or by custom, or by reason of charters, &c.

MUNICIPAL DOCUMENTS.

Cinque Ports. The Cinque Ports, which still retain many of their documents, afford also a few for the illustration of this reign.

SANDWICH.

1627. In the third year of Charles I. the annual rent of *Sandwich* was increased to 10*l.*, and in 1653, it was further increased to 20*l.*; and it is added, that the *corporation* had also at all times exercised the right of making such decrees, as it judged reasonable and proper, for regulating the *admission of freemen*, as appears by extracts from decrees taken from the records of the corporation.

One of which was in the second of Charles I.—the year be-

fore—stating, that at an assembly of that date, by general consent of the whole house, it was fully concluded and agreed:—that whereas there was a decree formerly made that a purchase of 5*l.* per annum should make the purchaser *free* of this town, and which was found inconvenient, unnecessary, and incommodious—because many persons had purchased *houses* of a small value on purpose to debar the town from having a greater sum of money for the same. Now it is therefore ordered and established that no man, hereafter, shall be made free of this corporation by purchasing any houses or land in this town, except the purchase be of the value of 10*l.* per annum.

Charles I.

1627.

Houses.

It is upon entries of this description that the *freeholders* of Sandwich were supposed to have a right of election there. We have previously shown how inconsistent such a supposition is with our ancient history, and the common and statute law. This entry is easily explained, by assuming that the purchaser was, according to the common law, to be the occupier of his purchase, and an *inhabitant householder* within the borough, which is consistent with the entry, and would reconcile it with the common law—whereas the other construction, in favour of the freeholders, renders it inconsistent with the general principles and practice of our municipal institutions.

Freeholders.

Inhabitant householder.

The following curious entry also occurs in the 16th of Charles I., among the papers of Sandwich, relative to the admission of a foreigner:—

1641.

“At an assembly, Jacob Costlebar of this town, gardener, a Dutchman of the first birth, did humbly petition to be admitted to enjoy the freedom and liberty of his purchase, for 40*s.*, or such other reasonable sum as the assembly should think meet; and for as much as it is against the *ancient and laudable customs*, ordinances, and constitutions of the town, that any Dutchman or Frenchman, or of any other foreign nation, should enjoy the freedom and privilege of this town by purchase, marriage, or apprenticeship,—it was therefore absolutely denied to admit him to enjoy the same by purchase—yet, nevertheless, the house offered him to enjoy

Foreigners.

Charles I. the freedom and liberties of this town by *redemption*, if he would give 20*l.* for the same: which he refused, and was, therefore, not admitted to the freedom of this town, but denied it."

Redemp-
tion.

Admission
of freemen.

In the same year, there are also entries of decrees, with respect to the *admission of freemen*, in which the reader will perceive, that the form and shadow of the ancient law was in some degree still preserved, though some modern innovations had been incorporated with it. It will be seen that they are particularly directed against the *foreigners* mentioned in the former entry.

Foreigners.

1641.

Marriage.

Purchase.

Serving.

Foreign-
ers.
English
born.

"There are decrees, customs, and constitutions of the town and port of Sandwich, expressing that the freedom and privileges of the town and port ought to be enjoyed and gained, by reason of *marriage* with any freeman's daughter—by *purchase* of tenements or lands in Sandwich, of the yearly value of 10*l.* or upwards—and by *serving* and *dwelling* with a freeman of this town, as an *apprentice*, by the space of seven years. And for as much as in the decrees, customs, and constitutions, no express mention is made whether they should extend to Englishmen, Dutchmen, or Frenchmen, or any foreign nations; for the better explanation thereof it was by most voices, by pricking according to ancient custom, ordained and established; that the decrees, customs, and constitutions, should not be taken, or expounded, in any manner to extend to Dutchmen, Frenchman, or any persons of any foreign nation, but to English born subjects only. And that no Dutchman, Frenchman, or any other person of any foreign nation, should have or enjoy the freedom of the town, any decree, custom, or constitution, to the contrary in any wise notwithstanding. Provided always, that that decree should not extend to Dutchmen or Frenchmen of the second birth, born in the town and port of Sandwich. But they might have and enjoy their freedom by redemption only, and by no other ways, if they agree and compound with the corporation.

HYTHE.

There are also some entries relative to *Hythe* of this reign, which it may be material to quote.

In the fourth year of Charles I., it was ordered by the mayor, ^{1628.}
jurats and commoners, that all those persons who had formerly paid any money towards the effecting or obtaining a haven here, which were since that time dead, *or had removed their dwellings out of the town*, should absolutely lose their monies, in regard of the manifest great impositions and burthens lately imposed and put upon the *inhabitants who now reside*. ^{K. fo. 82 b.}

At an assembly in the same year it was also ordered, that ^{1629.}
" Mr. Browneinge, having of *late departed the town*, and ^{K. fo. 84 a.}
" *neglected his office and service of a jurat* here, and only ^{Jurat.}
" upon set purpose to avoid the office of a bailiff to the town
" and port of *Great Yarmouth* the next fishing season, as it ^{Yar-}
" did appear by relation of many in this house, which was ^{mouth.}
" done by an ill example, to the great prejudice of the ports
" in general, it is thought fit, and agreed upon by this as-
" sembly that Mr. Browneinge, for his offence and neglect
" of service, shall forfeit the sum of 10*l.*, to be paid to the
" chamberlains, to the use of this township, if he at any
" time hereafter require his place of jurat again; before he
" be restored in statu quo."

And also in the ninth year of Charles I., at an assembly ^{1633.}
holden by the *mayor and jurats and commons* of Hythe, it is ^{K. f. 130 b.}
entered, that

" Whereas William Symons and William Deedes, *warned*
to appear here this day to take the several oaths of a *freeman*, ^{Freemen.}
viz. to maintain the charters, liberties, immunities, &c. of the
Cinque Portes in general, and of this town of Hythe in parti-
cular, have made their appearance accordingly, *but absolutely*
refuse to take the said oaths, therefore it is ordered, that Wil-
liam Symons and William Deedes shall be fined 10*l.* a piece ^{Oath.}
to the use of this town."

Charles I.

LYME.

Wages. The following entry from the books of *Lyme* will show,
 Inhabi- that the wages of the members were paid up to this time,
 tants. and by the *inhabitants*.

1642. In the 18th year of Charles I. an order was sent from the House of Commons to the mayor, aldermen, and common council of Lyme to require them to pay to Mr. Toll and Mr. Percival, their burgesses in Parliament, the same allowance as formerly; being 5s. per day.

In answer, the mayor, &c. acquainted the House, that theretofore no parliamentary wages had been paid before the Parliament ended: nor then out of the town stock; but by the *freemen and inhabitants*:—saving of late, of mere bounty, the burgesses were diversely rewarded by the representative body. Also the impossibility of performing the order, there being no *town stock*, the revenues not being sufficient to defray the necessary charges in common; besides extraordinary expences unavoidably falling upon them daily, for the safety of the town and kingdom.

POOLE.

1645. It appears from an entry in the books of *Poole*, of the 20th of Charles I., that “ It was agreed at a public meeting in the Guildhall of the town, that *no free burgess* should any longer enjoy his privileges, than during his *residency* in the town. And that every such person should be deemed a *stranger* to them, the *mayor, bailiffs, burgesses, and inhabitants*.”

NEWCASTLE.

1644. And, to conclude our extracts by a document of this reign, which will distinctly show that the *guilds and fraternities*, were distinct from the municipal bodies, there is a petition of the *governors, wardens, assistants of the fellowship of merchant adventurers* of *Newcastle*, to Parliament, in the 19th of Charles I., in which it is set forth, that they have been an ancient company of merchants ever since King John's time, and have been confirmed by several grants of his majesty's

royal predecessors, *a distinct corporation of themselves*; adding, that the merchants of Newcastle are an ancient guild of merchants ever since the 17th of John, a year before the grant was given to the London merchants.*

Charles I.
Corpora-
tion.

IRELAND.

Ireland does not appear at the beginning of this reign to have been the object either of direct interference by the crown, or of legislative regulation by the Parliament.

Indeed, with one exception, no statutes appear to have been passed respecting it, till the 10th year of Charles I.

Statutes.
1634.

The exception to which we refer is a document in the Harleian MSS.* of the date of the first of Charles I., which is a draft of the act of the privy council in Ireland, commencing with a recital, that in several *cities* and other *corporate towns*, great complaints had been made to the lord deputy against the unreasonable and exorbitant bye-laws made therein, to the great oppression of his majesty's subjects and all others trading there. And that for the future prevention thereof, it was proposed to ordain, that "true and perfect documents of the same should be brought in from all the *corporate towns*," in order that they might receive consideration.

Bye-laws.

It does not appear that this afterwards passed into an act, but it is sufficient to show that *the same abuses had arisen in the same manner in Ireland as in England, from the corporate bodies taking upon themselves to make illegal and injurious bye-laws*; an evil which had been much aggravated in both countries by the opinion of the judges in the case of corporations.†

CHARTERS.

The king, however, in the commencement of his reign, granted a few charters to some of the principal towns in Ireland, of which we shall give one or two specimens, for the

* There seems to be a mistake in this latter assertion.

† Harl. MSS. 2106, 131.

‡ Vide ante, p. 1447.

Charles I. purpose of establishing, that *the charters in Ireland were the same in substance as those of England.*

WATERFORD.

In consequence of a commission which James I. issued in 1617. the 15th year of his reign, all the liberties in *Waterford* 1626. were *seised* into the king's possession. Charles I., however, restored them to the citizens, but previously exacted a fine (as appears by the original charter) of 20,000 marks.

The king, after reciting the charters of the third of John, 16th Henry III., 38th Edward III., first and second Henry V. 26th Henry VI., first Edward IV., third Henry VII., 11th, 16th, and 25th of Elizabeth, and seventh of James I., proceeds to state, that the *citizens*, from time immemorial, &c., had enjoyed divers liberties, &c.; that James I., in the 15th year of his reign, had seised the city and liberties into his own hands, and that they had remained so until his death, and that they were then in his hands, but that the *citizens* had petitioned him to re-admit and restore them to their former state.

That countenancing his subjects *residing* in the city—and recollecting that it was an ancient city—and that the *inhabitants and citizens* had ever been intent upon the art of merchandising—that they were sprung from English stocks, and at that day retained their English surnames—that in ancient charters it had been called the Untouched City, and chamber of the king—and that the city had then decayed from its ancient flourishing condition, granted (after particularly describing the liberties and precincts,) that it County of itself. should for ever thereafter be a *county distinct* of itself, and separated from the county of Waterford, and from the county of Kilkenny, and from all other counties whatsoever, by the name of the county of the city of Waterford.

That the *citizens* of the city of Waterford, as also the mayor, sheriffs, and citizens of the county of the city, *and all and singular the citizens, inhabitants, and residents* within the city, or within the towns, villages, hamlets, and precincts

aforesaid, and their successors, by whatsoever name or names Charles I. 1626.
of *incorporation they were theretofore incorporated; or*
whether they had been theretofore incorporated or not, might
be for ever *one body corporate and politic*, by the name of Corporate name.
“*mayor, sheriffs, and citizens of the county of the city of*
Waterford, in the kingdom of Ireland.”

The usual corporate powers then succeed.

Restitution of the liberties and lands are also granted to the mayor, sheriffs, and *citizens* which they or their predecessors by the name of the “*citizens*,” or by the name of “*provost, bailiffs, and citizens*,” or by the name of “*mayor and bailiffs*,” or by the name of “*mayor, bailiffs and citizens*,” or by the name of “*mayor and commonalty*,” or by any other name or names whatsoever, or by any *incorporation* or incorporations whatsoever, or under *pretence of any incorporation* whatsoever theretofore enjoyed, or ought to have been enjoyed.

That all the *inhabitants, tenants, and other residents* whatsoever within the city, town, villages, hamlets, and precincts, within the county of the city, should remain under the ordinances of the city, and under the government of the *mayor, sheriffs, and citizens of the county of the city* in like manner to all intents and purposes, as the *inhabitants, tenants, and residents of the county* of the city ever theretofore were, or for the future ought to be. Mayor, &c.

That there should be a mayor, two sheriffs, 18 aldermen, and 19 assistants elected from the most honest and discreet *citizens*. Citizens.

That the sheriffs, aldermen, and assistants, for the time being, might be called the *common council* of the city, to be aiding and assisting the mayor, for the time being, in all matters concerning the government, or of the courts of the city. Common council.

The first mayor, two sheriffs, 18 aldermen, and 19 assistants, are then appointed and named.

It was also directed that the election of mayor should be by the mayor and common council. Mayor.

That of the sheriffs by the mayor and common council.

Charles I. That the aldermen and assistants should be removable by the common council.

1626.

That they might have a recorder, sword bearer, common clerk, and coroner—and to hold a court of record every Monday and Friday before the mayor and recorder, or their deputies.

That the mayor, sheriffs, and *citizens* of the county of the city of Waterford, might have and hold within the city or within the liberties or precincts of the county of the city, a *court leet* and a *view of frankpledge*, and all things that do belong, or ought to belong to a court leet and view of frankpledge, of all the *inhabitants* and *residents* within the city or county of the same, twice in the year, &c.

Leet.

That the mayor, recorder, and four elder aldermen, should be justices of the peace.

Citizens. That the mayor, sheriffs, and citizens, might have an admiralty jurisdiction :—and no other ministers were to intro-
mit.

That the mayor, sheriffs, and citizens, and their successors, and all the inhabitants, and their successors, who should be *free citizens and inhabitants* of the city, by right of birth, marriage, or apprenticeship, and not otherwise; for all their goods and merchandises within the city of Waterford and kingdom of Ireland, should be for ever freed and discharged from all toll, &c.

Free from
toll.

That the mayor, sheriffs, and citizens, and their successors, might have all their reasonable *guilds*, as the mayor, burgesses, and commonalty of the city of *Bristol* have had—but that they should make no statute, law, ordinance, &c. to bind any citizen or inhabitant, unless they first have authority and power, &c. from the mayor, sheriffs, and citizens for the time being, under their common seal.

Guilds.
Bristol.

That no citizens should be troubled *out of the city* for any action, &c. arising within it.

That they should have power to dispose and devise their lands; and that no stranger should be a wine vendor, unless it be in a ship, &c.

CORK.

This king granted a charter to *Cork*, which commences with an inspeimus of the principal previous franchises, and then recites that he had granted to the mayor, sheriffs, and *commons*, and their successors, all lands, forfeitures, &c., custom of fairs, markets, pye-powder courts, *view of frank-pledge, return of writs, &c.*, which they or any of their predecessors had—by *whatsoever name or names they were incorporated*, or by what other incorporation or by reason of any charter theretofore granted, or by custom or *prescription*.

Frank-pledge.
Return of Writs.

That the *burgesses* had petitioned him for a *confirmation* of their charters, with additional privileges; and in consequence of the mayor, sheriffs, and *commons*, having by the direction and request of two of the privy council acquitted his engagement for the sum of 2000*l.*, laid out for the county towards the relief and sustenance of the soldiers and officers, the king granted, that the mayor, sheriffs, and *commons* of the city, *by what name or names theretofore they were incorporated*, should from thenceforth for evermore be one body corporate and politic in deed and name.

Corporate.

That there should be of the most honest and discreet citizens one elected to be mayor, and two to be elected and called sheriffs.

Mayor.
Sheriffs.

The first mayor and sheriffs are then named and appointed.

And it is granted, that yearly the mayor, sheriffs, and *commons* should elect one person of the *commons* of the city to be mayor, and two of the *commons* to be sheriffs.

A recital then occurs that the city of Cork, consisting of two parishes within the walls and county thereof, had, within the ancient liberties and franchises of the city and county, four abbeys lately dissolved, in which merchants, tradesmen, and artificers *resided*.

Abbeys.

The king then commands that the possessors of any parcel of the possession of the abbeys, *dwelling* within or near the franchises, liberties, and government of the officers of Cork, should continue under the government of the officers

Dwelling.

Charles I. of the city, and to that end should freely contribute *towards*
 1631. *the public charge of the city*, as often as occasion should re-
 Public quire.
 charge.

That the sheriffs might hold a monthly court for the execution of what to a sheriff's office appertained, according to the laws and statutes of Ireland.

Justices. That the mayor, recorder, and four of the elder aldermen, who had discharged the office of mayor, should *be justices* of the peace, with powers to hear and determine all felonies, &c. committed within the city; with a non-intromittant clause as to county justices. And they are also to be judges of gaol delivery.

Fines. All fines, forfeitures, &c. of any of the *citizens* and *inhabitants* dwelling within the city and county of the same, are given to the mayor, sheriffs, and citizens.

Aldermen. That every mayor of the city after the time of his mayoralty, should be reputed one of the aldermen, and should be allowed in the number of the mayor, sheriffs, and commons of the common council of the city, provided that the common council should not exceed 24.

That no merchant or other person, not *free* of the city, should sell any merchandise within the same to the *freemen* or *inhabitants* of the city (victuals at fairs excepted), otherwise than at the quay of the city, &c.

Mayor. That the mayor should be the chief commissioner in all commissions to be executed in the city.

Clauses then occur respecting the election of clerk of the crown and notary public, who were to be *citizens*.

That the mayor, sheriffs, and commonalty, should have all the petty *customs* issuing out of all merchandises, &c.

Vacancies. That the mayor, sheriffs, and commonalty, should elect (as vacancies occurred) six aldermen of the city, who were, and should be called severally, aldermen of their several
 Wards. *wards*, to hear and determine within their several *wards* all causes happening betwixt party and party, for any sum not exceeding 40s.

That no person should be tolerated to administer physic within the city, *though educated* in any academy or famous

college, unless he be allowed by the mayor to exercise medicine or physic, under the penalty of 40s. per month. Charles I.
1631.

That the mayor, sheriffs, and *commons*, should have power to erect and incorporate the several arts, mysteries, and trades, exercised within the city into several corporations, in such manner as to them should seem meet, for the better government of the artificers and *inhabitants*; which artificers, being so incorporated, might exercise their several mysteries in such sort as the commons of the city of *Dublin* used, and were accustomed to use, according to the ancient customs of any *corporation* within the kingdom of Ireland. Mysteries.

Dublin.

The society of the merchants staple are then incorporated; and the provisions relative to them are very numerous. The charter terminates with a general confirmation of all previous customs, charters, &c.

STATUTES.

We have already observed that, till the tenth year of this reign, there are no statutes applicable to Ireland. 1634.

The two first statutes in that year relate to subsidies, granted by the temporality to the king.

The third relates to the confirmation of letters patent, to be made upon his majesty's commission of grace, for the remedy of defective titles.

From which time the statutes in the second sessions relate chiefly to the introduction into Ireland of many of the English statutes, passed in the reign of Henry VIII., Queen Elizabeth, and King James—six and twenty acts being expressly for that purpose.

In the following sessions, the statute with reference to the confirmation of the king's letters patent is repealed. Another is passed for securing the estates of the undertakers. Another for the naturalization of the Scotch *ante nati*. A fourth for the confirmation of leases made by the lord primate and other bishops in Ireland. After which, fifteen acts in succession were also passed for the introduction of previous English statutes.

The next makes the nobility of Ireland, *dwelling* in Eng- Absentees.

Charles I. land or elsewhere out of that kingdom, liable to the general public charges.

1634.

In the next year, the 10th and 11th of Charles I., the statutes which were passed were for the same object:—excepting one for the purpose of preventing the barbarous custom of ploughing by the tail, and pulling the wool off living sheep. Another for the suppression of cosherers and *idle wanderers*: and another to prevent the unprofitable custom of bringing corn in the straw.

1641.

No other statutes occur till the 15th of Charles I., when the greater part are also introductions of the English laws. There are no other Irish statutes from that year till the 13th of Charles II.

Mr. Gale, in the work which he has published to illustrate the history of the municipal institutions of his native country, has given an Irish statute which is not to be found in the published collection.

As further illustrative of the doctrine we have hitherto maintained, of the distinction between the merchant guild and the municipal government of boroughs, we shall give the following extract from it:—

Corpora-
tions.

It is of the 17th of Charles I., and is an act respecting bye-laws and ordinances; which commences by reciting, that many and divers *private corporations* or bodies corporate, within cities, towns, and boroughs, have been established contrary to the king's prerogative, &c. It was therefore enacted, that no masters, wardens, nor fellowships of crafts, mysteries, trades, or occupations whatsoever, nor any of them, nor any rulers of guilds or fraternities, should from thenceforth take upon them to make any acts, bye-laws, or ordinances, &c., unless examined by the lord chancellor, &c., under 10l.

1646 to 1660.

During the *suspension of the constitution* for 14 years, from 1646 to 1660,* the House of Commons, amongst other usurpations of the prerogative of the crown, formed a committee for considering how the *corporations* could be settled, and how their charters might be altered and renewed, to be held under the authority of the Commonwealth. And in 1656, a committee was appointed to prepare a bill to prevent the election of denounced persons into corporations.† In 1654,‡ the oath was prescribed by the House of Commons to be taken by a member of Parliament, to be faithful to the lord protector, and that he should not propose, or consent to alter the government in one person and the Parliament. And the meaning of the oath is declared.

Corporations.

In 1659, the House proceeded to the extent of *dissolving and disincorporating the city of Chester*, and ordering that it should have no distinct county jurisdiction, but should be laid to the county at large.§

Chester.

And it was afterwards resolved, that if any bill should be tendered at any time thereafter, to alter the foundation and constitution of the government of the commonwealth from a single person and a Parliament, to such bill the single person should have a negative.||

Cromwell also took upon himself to create two barons, 11 baronets, and 28 knights, including one of the foreign ambassadors, and some of the aldermen of London. And Henry Cromwell knighted three others.

LYNN.

Amongst the records of the borough of Lynn, we find the following extraordinary document, dated 1st of September, 1649, subsequent to the "ordinance" of the Commons for taking away the House of Peers. Although some lords

* 7 Journ. 178.

† 7 Journ. 461.

‡ 7 Journ. 368.

§ 7 Journ. 780.

|| 7 Journ. 385.

1649. were still to be admitted to Parliament, and to have free vote there, if thereunto elected.

“ Ordered, that a letter be written to the Right Honourable the Earl of Salisbury, by the mayor from this house, to give him knowledge that this house has granted him *the freedom of this borough*, and that the *commonalty* of this burgh have elected him a burgess of the Parliament of England.

THE EARL OF SALISBURY'S LETTER.

“ Gentlemen,—

“ As the precedent you have made in choosing me to be your burgess is *unusual*, I believe, *if not the first amongst you*, so does it lay the greater obligation upon me; neither is that favour a little heightened by my being so much a *stranger* to you as indeed I am; and as you have here a free acknowledgment from me of your open and kind and good affections, in so unanimous an election of me to serve you in Parliament, as your letter doth express, so cannot they merit, or you expect more thanks than I do really return unto you for them. You have been pleased cheerfully (as you say) to confer your freedom upon me. I shall ever be as zealous in maintaining yours; and as I am not ignorant of the great trust you have placed in me, so shall you never be deceived in it, for the addresses you are to make to me (as your occasion shall require) they shall not be so many as cheerfully received, and whatsoever may concern the public good or yours, shall ever be pursued with all faithfulness by him that is,

“ Your very loving friend,

“ Salisbury.”

1655.
Swansea.

In 1655, Cromwell also directly assumed another important prerogative of the crown, and granted a charter to Swansea, which is said to be a borough by prescription, and to have had a charter in the reign of Henry II.; but this lacks proof.

In the reign of King John, we have already seen,* that a

* See before, p. 419.

charter was granted to the burgesses and their *heirs*, which was not a charter of incorporation. Heirs.

Henry III., Edward II., and Edward III., are said to have given them charters of *confirmation*.

That of Oliver Cromwell recites it was an ancient port town; and adds the unfounded statement which we have seen before in so many previous charters, that it had been *time out of mind a town corporate*, for which there is no pre-tence. That at the petition of the "portreeve, aldermen, and *burgesses*," he had granted that Swansea should be a free town and borough, and that the *people* therein *dwelling and inhabiting*, and thitherto known by the name of "port-reeve, aldermen, and burgesses," should be a body politic, by the name of "the mayor, aldermen, and burgesses." Corporate.

The usual corporate powers then follow.

And it is directed that the mayor and common council should have power to call* and admit into the guild and burgess-ship of the town, so many able and discreet persons as to them shall seem fit, and upon just cause to disfranchise them. Admit.

That the common council should consist of one mayor, one high steward, one recorder, twelve aldermen, twelve chief or capital burgesses. And the mode of electing these officers bears the strictest analogy to that practised in other boroughs at this period.

That the common council might *tax* the *inhabitants* and occupiers of land, to defray the necessary expences of the town. Inhabitants

That the mayor, high steward, his deputy, the recorder, and the portreeve of the year past, and the last year, with one of the aldermen, should be justices of the peace.

A non-intromittant clause—*view of frankpledge*—a court *leet*—*return of writs*—that no foreigner or stranger to the liberties should use any stall, &c. in the fair without leave of the mayor and aldermen;—and exemption from bearing any office, or serving on *juries* out of the borough, unless at the grand sessions, close the grant.

Frank-pledge.
Leet.

* See before, Cinque Ports, "advocants."

This is the only charter we have been able to discover upon the rolls at this period; and it will be perceived that it is in substance the same as others, and requires no particular observation.

ORDINANCES.

The "ordinances" which have been published* as made during this period, also contain but little matter worthy of remark.

They commence with the act for triennial Parliaments—and the king's name is used in them for the 37 first chapters.

1642. But in the year 1642, the ordinances were by the lords and commons in Parliament—they sequestered the delinquents' estates—they ordered the levying of taxes and duties—horses and money for the support of the army.—They let the lands of the members of Parliament who were absent from the House—they directed the appointment of preachers and ministers; visitors were named for the Universities, as well as for Westminster, Winchester, Merchant Tailors, and Eton Schools; and unlicensed publications were prohibited.

1648. Till 1648, the "ordinances" were made by the "lords and commons," after which by the "commons" alone, till 1649, when that description not being thought sufficiently authoritative, they adopted the name of "Parliament,"—apparently without any authority or justification for doing so.

And it was ordained, amongst other things, that it should be high treason to declare "that the Commons in Parliament had not the supreme authority."

1653.
Lord Pro-
tector.

In 1653, Oliver Cromwell took upon himself the title of "lord protector of the commonwealth of England, Scotland, and Ireland:" and described himself as having the exercise of the "chief magistracy and administration of the government." And he took to himself the appellation of "highness,"† an act being made for the security of his person; and the House of Commons were induced to request him to appoint his successor, and to call a Parliament, to consist of

* See Scobell's Collection of the Acts and Ordinances.

† Scobell, 2nd part, 275.

two Houses; and the numbers and proportions of the members were to be defined. Before this there had been a dissolution of Parliament, and another appointed for the 3d of September following. And then the acts were passed in his name.*

During this period, a statute was created for the pacification of Scotland, for uniting it with England, and erecting courts baron there.

Nothing further material to our purpose occurs in these ordinances.

CASES.

In this period also of our history there are but very few cases to illustrate the subject of our inquiry;—such as they are—though scanty—we shall extract.

Thus, in 1651, the court was moved for a writ to *swear* one 1651.
into the office of *mayor*,† to which he was elected for the borough of Trevenny in Cornwall, because the old mayor did not swear him in in due time, but adjourned the court.

Roll, chief justice.—There is no precedent to swear such an officer; yet ordered that notice should be given to the town, and precedents to be brought into court, if any were, to warrant it.

In this case we see the jealousy of the Court of King's Bench, in enforcing the administering of any oath unless it 1651.
was warranted by law. Oaths.

And in a case in Keble's Reports,‡ in 1651, against the 1651.
mayor of Bristol, who was brought in upon attachment for disfranchising an attorney for refusing to swear (as is used in London) not to sue another *freeman* at common law out of the town, because he had taken a *latitat* against him—the *court conceived that part of the oath was illegal*; though in 1651.
regard that it had been before used, the present mayor was excused of contempt. Illegal.

In 1655, Yates and others, freemen of the town of King- 1655.
ston-upon-Thames,§ having been *disfranchised* by the bailiffs, Disfranchisement.

* Scobell, 378.

† Styles, 299.

‡ 1 Keb. 698.

§ Styles' Rep. 477.

1651. &c. of that place, moved for a writ of restitution, which was
 Restitu- awarded; and the substance of the return was, "that a
 tion. "difference had arisen amongst the corporation about
 Return. "making an attorney of the court. And at a court held for
 "that purpose a tumult arose, upon which the bailiffs ad-
 "joined the court; and commanded every person to depart.
 "But Yates and others persisted in remaining in the town
 "hall, saying, 'they were a court,' and made several entries
 "in the court book."

Excep- To this return many exceptions were taken; one was,
 tions. that it did not show that the customs of the corporation war-
 ranted them in disfranchising any persons for such offences;
 nor showed that any person had at any time been disfran-
 chised for such causes.

To which it was answered, that "it was a high contempt
 "and just cause to disfranchise the parties, for they com-
 "mitted an act of a high nature, tending to evert all govern-
 "ment, in hindering the proceedings of justice, and the profit
 "and welfare of the town."

Judgment. But the chief justice said, that "*custom* was the main cause
 "of *disfranchising* any person—for by the disfranchisement
 "the party loses his freehold, and therefore not to be put in
 "practice but upon very good warrant. And yet in some
 "cases, for the advancement of government, one may be
 "put out of his freehold without a legal proceeding against
 "the party, as Sir James Bag's case is; but there must be a
 "*custom* or statute to warrant it."

The parties were all restored to their freedom.

Disfran- It is difficult to conceive how the right of disfranchise-
 chisement. ment could depend upon *custom* only; or if the body of
burgesses could not by the general law have that power,
 how it could on principle be supported by custom.

It seems from the history we have before given, as well as
 from the general principles and the usual practice of the
 law, that such a power would necessarily be inherent in the
 body of the *burgesses*.

If they had the power of receiving a person into their
 burgh—if they were responsible for him, and therefore had

the necessary right of considering whether he was a fit person for them to admit—they would likewise have, as a consequence, the right of rejecting him, or *disfranchising* him if he should act in such a manner as to be unfit to continue in the place, or to be a member of their body—for if he should be convicted of treason—felony—or any infamous offence; if he should act in defiance of the authorities of the place, or against its general interests—it would be absurd not to give them this power of removing him. Reason, therefore, also supports this right—and there is nothing of expediency which militates against it—but, on the contrary, expediency would also justify it. Nothing is so important to society, as that *character*, either good or bad, should have its full influence; and as it would be contrary to justice, for a person of good character to be excluded; it would be equally contrary to the interests of society that a person of bad character should be permitted to continue one of the *burgesses*. Nor can anything be more desirable, than that these matters should be settled by the people themselves upon the spot; for *character can only operate locally*, and therefore it would be essentially beneficial that the *burgesses* should have themselves, in the first instance, the settlement of these points; and if they act unjustly or unfairly, (which would be more rare in matter of character than many people are prone to believe,) the superior courts would, upon application, correct the abuse, and do justice to the injured party.

1656.

There is one other case in the year 1656,* respecting the corporation of soap makers, in which it is stated that in the Cinque Ports, the *inhabitants* had a privilege to be impleaded there and not elsewhere.

1656.

Inhabitants.

That those bye-laws were good in law, which served for the good government of a society.†

Bye-laws.

That a bye-law made in a *leet*, that none should receive any to *inhabit* there, that was not *born* in the leet, or had not *inhabited there for the space of three years*, unless he brought a *testimonial of his good behaviour*, and showed it

Leet.

* Hardress's Rep. 56.

† Mic. 6 James I., Bonner's case.

1656. to the *constable*, under a certain pain, was a good bye-law ; and yet it was, to some extent, against the general liberty of the subject, by which any man might go and live where he pleased :—but these restrictions are necessary for the public good, and are fully justified by the principles to which we have above referred.

1649. In 1649, Lord Fairfax, with the *council of officers* belonging to the army under his command, presented a petition to the Parliament, “ for an agreement of the people, together with some regulations for new-modelling future Parliaments.”

The number of members was reduced to 400 ; and divided amongst the counties and principal boroughs in certain proportions.

The *electors* were to be *natives of England* ; not servants receiving wages, *but housekeepers dwelling* within their respective districts.

All the elections were to be on the same day.

Cromwell afterwards added a qualification for the voters of 200*l*.

SALISBURY.

1654. The following are cited as examples of the indentures of returns to Parliament at this period, extracted from the original documents at the Tower. For *New Salisbury*, the indenture is between the high sheriff of Wiltshire, and the *citizens and inhabitants* of New Salisbury of the other part, who elect Edward Tooker and William Stephens, Esquires, who were to act for themselves and *all the people of the same city*.

YARMOUTH.

The indenture of *Yarmouth* is between the sheriff of Norfolk, and the bailiff, *burgesses and inhabitants*, who elect the Honourable Colonel William Gough and Thomas Dunne, who were *to act for themselves and all the people*.

And the same form, *mutatis mutandis*, for Lynn, Marlborough, Devizes, and other boroughs.

From these returns it will be seen, that the opposite

error which had been for some time adopted, increasing in its effect from the reign of Henry VIII., to the middle of James I., was resorted to at this period of our history.

1654.

The unrestricted voting of the *inhabitants* seems for some time to have been permitted, without any *admission*, *enrolment*, or *swearing*—or the usual requisites of being *householders*, *inhabitant*, and *paying scot and lot*.

Inhabitants.

This was an innovation upon the principles and practice of the constitution, and obviously unreasonable, and ill-reconcilable with the principles of our institutions, which have been traced through our preceding history. And therefore it was soon found to be impracticable; and though apparently referred to in the triennial bill, which we have before mentioned, yet it was partly abandoned at a subsequent time by Cromwell himself, and altogether set aside upon the Restoration.

CHARLES II.

The nation, disgusted with the violence they had witnessed after the Parliament had commenced their encroachments upon the crown—harassed by the convulsions in the state, ~~and~~ the incessant changes from the uncertainty of popular government, and the harsh tyranny of the House of Commons, followed by the severe government of a suspicious usurper—ardently longed for repose; and, in the words of Monk, “All ranks of men, in all places, were in earnest expectation of a settlement after the violent convulsions to which they had been exposed.”

1660
to
1685.

One of the invariable misfortunes attendant upon all changes of government—particularly those which have been accompanied with violence—is, that the strong acts adopted on the one side, are sought to be remedied by stronger in the opposite extreme.

Charles II. . Thus it was with those which followed soon after the restoration of Charles II.

1660.

Those which immediately succeeded partook of the temper and moderation which characterised the conduct of Monk and the real patriots who acted with him.

But afterwards, when the minds of men began to acquire a momentum in the opposite direction to that which they had recently left ; then intemperate and oppressive acts ensued, and the happy restoration of the king was followed eventually by circumstances which are painful to detail.

STATUTES.

1660.

The acts which were first passed will be found to partake of the wisdom and moderation to which we have alluded.

They were enacted in the old form—by king, lords and commons. They continued all judicial proceedings. The subsidy of tonnage and poundage was again granted : and the excise was continued.*

An act of free and general pardon, indemnity, and oblivion, was passed ; reciting, “ that the king’s most excellent “ majesty, taking into his gracious and most serious consideration the long and great troubles, discords and wars “ that have for many years past been in this kingdom ; and “ that divers of his subjects are by occasion thereof, and “ otherwise, fallen into and be obnoxious to great pains “ and penalties :—out of a hearty and pious desire to put “ an end to all suits and controversies that by occasion of “ the late distractions have arisen, and to bury all seeds of “ future discords, was pleased that a general pardon might “ be enacted.”

There was also a statute for the confirming and restoring of ministers.

Wards
and
Liveries.

Another was passed for taking away the courts of wards and liveries, and tenures in capite and by knight service, and purveyance ; and for settling a revenue upon his majesty in lieu thereof, upon the ground that they had been more

* See also 15 Charles II. c. 11, 12 ; 16 & 17 Charles II. c. 4 ; 22 & 23 Charles II. c. 5.

burdensome, grievous and prejudicial to the kingdom than ^{Charles II.} beneficial to the king. 1660.

This act is said to have been drawn by Lord Chief Justice ^{Tenure.} Hale:* and it provided amongst other things, that all tenures to be thereafter created by the king, of an estate of inheritance at the common law, should be in free and common socage. But there is a proviso, that the act should not extend to prejudice the customs of the city of *London*, nor of ^{London.} any other city or town; nor Berwick: nor to discharge any ^{Appren-} apprentice from his apprenticeship. And it has been held, ^{tice.} that it does not affect burgage tenure.†

Acts were also passed for levying the arrears of the assessments: and for the paying and disbanding of the army and navy.

An act of severe but necessary justice, was passed for the attainder of those who had been guilty of the murder of Charles I., which in the preamble, charges them with having plotted and contrived the ruin and destruction of the monarchy, and with it the true reformed Protestant religion, under which it had been so long protected and flourished. That they had thrown down all the bulwarks and fences of the law, and had subverted the very being and constitution of Parliament. And the lords and commons protest against the murder of the king; and it is 'declared, " that by the " undoubted and fundamental laws of this kingdom, neither " the peers of this realm, nor the commons, nor both together, " in Parliament or out of Parliament, nor the people collec- " tively or representatively, nor any other persons what- " soever, ever had, have, hath, or ought to have, any coer- " cive power over the persons of the kings of this realm."

In the next year, an act was passed for the safety of his ^{1661.} majesty's person and government, in which it was again declared, that there was no legislative power in either or both Houses of Parliament without the king; and certain orders and ordinances made by them were accordingly declared void.

Another act was passed against tumults and disorders, upon pretence of preparing or presenting public petitions

* 3 P. Wil. 125.

† Co. Lit. H. & B. 106 a.

Charles II.
1661. or other addresses to his majesty or the Parliament, which commences by reciting, that it had been found by sad experience, that remonstrances and declarations, and other addresses to the king, or to both or either Houses of Parliament, for alteration of matters established by law, for the redress of pretended grievances in church or state, have been made use of to serve the ends of factious and seditious persons, gotten into power, to the violation of public peace, &c.

It was therefore enacted, that no persons after the first of August 1661, above the number of 20 or more, shall present any petition, &c. for alteration of matters established by law in church or state, unless the matter have been first consented unto and ordered by three or more justices of the county, or the major part of the *grand jury* of the county where the matter arose.

Grand
Jury.

Another statute declared the sole right of the militia to be in the king.*

Corpora-
tions.

The second statute in the same year, contains an act of considerable importance for the well governing and regulation of *corporations*, and was, no doubt, intended to obviate those illegal amovals and appointments by the commons to which we have referred.† It recited that questions were likely to arise concerning the validity of the elections and removals during the late troubles, contrary to their charters—and to the end that the succession in such corporations may be the most properly perpetuated in the hands of persons well affected to his majesty and the established government; it being too well known, that notwithstanding all his majesty's endeavours and unparalleled indulgence in pardoning all that is passed, nevertheless many evil spirits are still working—therefore it was enacted, that commissions should issue for England, Wales and Berwick; that no charters should be avoided for any thing that had passed—that an oath should be taken and declaration subscribed by all the officers in the cities, boroughs, corporations and Cinque Ports; and that all who refused to take the oaths or subscribe the declaration

* See also the 13th and 14th Charles II. c. 3.

† See before, p. 1684.

were to be removed by the commissioners : who had power Charles II.
1661.
given to them for that purpose; as well as for the restoring those who had been illegally removed, and placing other members, or *inhabitants* there in the vacancies which should be made.

It was this statute which produced so great a change in many of the boroughs, and of which traces are to be found in the books of several of them.

Whether it took place during the usurpations of the House of Commons—or of Cromwell—or occurred at the time of the passing of this statute; certain it is, that in many boroughs most of the books previous to this date are destroyed : and those now existing commence with the acts done by the commissioners under this statute ; which, generally speaking, were for the removal of the greater portion of the officers of the corporation, and substituting in their stead the principal officers of state for the time being, together with some of the principal *inhabitants* of the place. Borough
Books.

The acts done by the commissioners appear to have required subsequent support from Parliament, for in 1662, a committee, in their report to the House of Commons, questioned whether the proceedings of the commissioners could be overruled in the King's Bench ? and whether it was the meaning of the House that it should be so ? If not, that it would be fit to provide for the quiet of the commissioners, and the security of the persons placed by them, by another bill for that purpose ; and to prevent the inconveniences arising to corporations by the *better sort of the members and inhabitants evading the offices and services incident to their places, by refusing to take the oaths, &c. and so leave the burden and charge of the government upon mean men not able to bear it.** And in 1680, leave was given to bring in a bill to repeal the act for the regulation of corporations.† 1662.

It is possible that this was done with good faith at the time, and might not have immediately produced any evil consequences. But in after times it led to great mischiefs, particularly as it afforded an excuse and precedent

* 8 Journ. 446.

† 9 Journ. 692.

Charles II. for non-residence, for which purpose these instances were
1662. subsequently cited.

Cap. 4. The act for the uniformity of prayer was also passed.

Cap. 10. Another for establishing an additional revenue upon his

Cap. 11. majesty. Another for preventing frauds in the customs;

Cap. 12. and an important act for the better relief of the poor, in
which the settling of them is first mentioned, and it is stated

Poor. also to be for the prevention of rogues and vagabonds. The
object of the provision being, that poor persons should be
restrained from going from one parish to another, which they
did in order to *settle* themselves in those parishes where
there is the *best stock—the largest commons or wastes*, and
the most woods for them to burn and destroy—provisions

Common which are a legislative recognition of the “common stock,”
Stock. to which we have before so frequently referred, as well as

Inhabitants of the right of the *inhabitants* to have and enjoy rights of
Rights of common. So that this declaration is directly against the
common. authority of the cases we have before quoted, denying the
*inhabitants’** right to an easement of that description.

The time prescribed by this act, within which a person
40 days. is removable, is 40 days; which, the reader will remember, is
the period assigned by the ancient law, within which a person
coming into any new place is bound to give notice to the
king’s officer of his arrival, upon which he would be com-
pellable to give his *pledges—to be sworn* to the law—and
to be *enrolled*. The previous settlement in the former
place of residence is described to be as a *native—house-*
holder—sojourner—apprentice or servant—for the space of
40 days; and they are to be removable, unless they give
sufficient security for the discharge of the parish.

Qualifica- In this description the reader will perceive, that all the
tions. qualifications by the common law, to which we have before
referred, as the *qualifications for burgess-ship* are here men-
tioned, with reference to a *subject altogether distinct and*
separate from any corporate right, with which it cannot pos-
sibly be confounded; and yet they are all grounded upon the
foundation of *inhabitancy*, which we have shown by autho-

* See before, p. 1528.

rities of all descriptions to be the essential qualifications for Charles II.
1662.
burgess-ship.

Thus, in this enumeration, we find a "*native*" mentioned— Native.
that is a person (according to the case we have lately quoted
respecting the city of London) *born* in the place, and there- Birth.
fore belonging to it.

A "*householder*," which has been sufficiently explained to House-
holder.
be the reason why an inhabitant was to be *sworn* and *en-
rolled*, and give his *pledges*, and pay *scot and lot*; and he
was irremovable, because his house was his castle, and no
man could be removed from it.

A "*sojourner*" was a person who had come to live in the Sojourner.
place, but who, when he had resided there for a year and a
day would, according to the law of the *leet*, which has been Leet.
so frequently explained, be irremovable.

An "*apprentice*" would also, for the reasons before ad- Appren-
tice.
duced,* be entitled to remain in the place.

And a "*servant*" who had been hired for a year, which is Servant.
the rule as to the settlement of the poor, borrowed from the
ancient common law, would come, like the sojourner, within
the law laid down in Glanville, as a fixed and permanent
inhabitant.

The 15th section of this statute is also satisfactory to show Sec. 15.
that *courts leet* were then in existence, though in some Leet.
places they had been omitted to be held; as it provides,
that in case a *constable*, *headborough*, or *tything man* should Constable.
die or go out of the parish,† any justice might make or swear
a new constable, until the lord should hold a *court leet*, or
until the next quarter sessions.

An act was also passed for preventing the unnecessary Cap. 21.
charge of sheriffs, and for ease in passing their accounts; as Sheriffs.
it was stated that in the late times of tyranny and oppression
they had been great sufferers, and thereby much impover-
ished in their estates and fortunes.

* See before, p. 762.

† There is no doubt that the leaving the parish would in this instance create an actual vacancy in the office:—and why should it not do so in the cases of corporate officers? See *Rex v. the Mayor of Truro*—3 Barn. & Ald. 590, and *Rex v. the Mayor of West Looe*, 5 Dow. & Ry. 414.

Charles II.

1672.

Cap. 9.

Inhabi-
tants.

Freemen.

Burgesses.

1677.

Cap. 2.

In the 25th of Charles II. there is an act to enable the county palatine of Durham* to send knights and *burgesses* to Parliament, which recites that the *inhabitants* of the county had not before exercised that privilege, although they were liable to all subsidies granted by Parliament, equally with the *inhabitants* of other cities, boroughs, and counties, who have their citizens, burgesses, and knights in Parliament;—wherefore it was enacted that the county should send two knights, and the city two citizens, to be *burgesses for the city*;—the election of the knights being by the freeholders of the county, and the election of the burgesses to be by the mayor, aldermen, and *freemen* of the city—the first authoritative instance in which the election is directed, by any statute or charter, to be by the “*freemen*,” and not in the usual language by the “*burgesses*.”

In the 30th of Charles II., the important act for the better security of the liberty of the subject, and for prevention of imprisonment beyond the seas—commonly called the Habeas Corpus Act, was passed; the difficulty complained of being, the delays made of the returns of writs of habeas corpus; and therefore, for the future, they are directed to be returned within three days, unless in cases of treason or felony.

There are many other statutes of importance passed in this reign, but they have so little connexion with the subject of our inquiry, that it is unnecessary to specify them.

CHARTERS.

Whilst the legislature were passing the statute we have quoted, and all men seemed to concur in submitting to the king's lawful prerogatives, and in cherishing the just privileges of the people and of Parliament, the king granted charters to many of the cities and boroughs in England.

LONDON.

London, as usual, was the early object of the bounty of the crown.

Charles II., in the third year from his restoration, after

* Harl. MSS., 7017, 502.

inspecting the charters which had been previously granted to the citizens of London, confirmed to them in the most ample manner all their privileges. Charles II.

NORWICH.

Norwich also received nearly at the same time,* that which is now the governing charter. It commences with a recital, that it was an ancient and populous city and community by itself, *incorporated* by the names of the “mayor, sheriffs, citizens, and commonalty of the city of Norwich”—“the citizens of Norwich”—“the citizens and commonalty of Norwich”—“the citizens and *inhabitants* in the same city”—and had received and enjoyed various liberties by charters and customs;—that the then mayor, sheriffs, citizens, and *commonalty* of the city of Norwich, had petitioned the king to confirm their previous liberties, and to give them such additional privileges as might seem expedient. 1663.
Incorporated.
Citizens.
Inhabitants.
Commonalty.

The king accordingly granted that they should be incorporated; with all the usual corporate powers.

The then municipal officers are confirmed in their respective offices.

And it was directed, that the mayor, recorder, steward, and aldermen, as long as they continued in office, should be justices of the peace—that they, by the oaths of *good and lawful men* of the city, might hear and determine all manner of felonies, trespasses, &c.

That every alderman should be a justice of the peace, through the whole *ward* of the city for which he might be respectively elected an alderman.

After which provisions are made for the punishment of persons elected in any *ward* to be of the common council or *livery* of the city, not attending to be *sworn* into office after notice given to them; and that if any person elected by the *citizens* from any of the four great *wards* to be of the common council should refuse, or be exonerated from such office, the mayor should warn the *citizens inhabiting* in such ward, Livery.
Citizens.

* Pat. 15 Car. II, pars 6.

Charles II. that they might name and elect another fit *citizen* of the
 Norwich. *ward* to be of the common council.
 1665.

It was also directed, that the mayor, sheriffs, and aldermen, should yearly elect one sheriff: and that the mayor
 Citizens. should yearly cause *all* the *citizens* of the city and county, *dwelling* therein, to be warned to appear at the guildhall of the city, and there freely in like manner elect and prefer one other sufficient person to be elected as the other sheriff.

That when any of the 24 aldermen should die or be re-
 Citizens. moved, &c., the mayor should cause all the *citizens inhabiting*
 Ward. *ing* within the *ward* for which they were aldermen, to be warned to meet at the guildhall, to elect others of the more worthy and sufficient *citizens or freemen* to be aldermen;
 Depart. and that if any of the aldermen should *depart from the city into another place to inhabit*, or should neglect the duty of his office, or should not return within six months after request made, he should be fined, &c. by the mayor, sheriffs, aldermen, and common council.

Bye-laws. That it should be lawful for the mayor, sheriffs, and aldermen, with the assent of their 60 fellow citizens of the common council, to make ordinances, &c. for the government of the citizens.

A court of equity is then granted—and that recognizances of statute, merchant, &c., should be taken in as ample a manner as the mayors were accustomed to do of the cities of *London, York and Bristol*.

Freeman. That no *freeman* of the city should be a partner or factor
 Foreigner. with any person who should be a *foreigner* and not a free-
 man, in buying or selling any woollen cloths, &c.

Various provisions as to the grant of the goods of felons, &c., with an ample confirmation of all previous franchises, conclude this charter.

IPSWICH.

1665. A charter of nearly the same date recites, that *Ipswich* was
 Corpora- an ancient and populous borough, and had for many ages
 tion. been a *corporation*, or body corporate and politic. That the

burgesses and *inhabitants*, by the name of the “bailiffs, bur-
gesses, commonalty, and their successors,” and other names
had held liberties, &c., as well by charters and confirmations
of Charles I., as by *prescriptions* and customs: that the
then bailiffs, *burgesses*, and *commonalty* had besought the
king to confirm their body corporate, and ancient liberties,
&c.—and to grant such other as might be deemed expedient:—which the king granted accordingly.

Charles II.
Ipswich.
1665.
Inhabitants

And that there should be a high steward, 12 portreeves
of the town, and the 24 chief constables, commonly called
the 24.

That when any vacancies occurred amongst the portreeves
and chief constables of the town, the members of the respec-
tive bodies were to supply the deficiency, &c.

GLOUCESTER.

Gloucester also obtained a charter in this year, which was
afterwards surrendered in this reign.

1664.

BRIDPORT.

This king granted a charter to *Bridport*, which commen-
ces by reciting, that the burgesses and *inhabitants* of the
borough, by the name of “the bailiffs, and *burgesses* of the
borough of Bridport, in the county of Dorset,” and by other
names, had enjoyed divers liberties, &c. by charters and pre-
scription, and also by virtue of a charter of James I.

1657.

Burgesses.

That the bailiffs and burgesses had petitioned him, for the
better government of the borough, to confirm their body cor-
porate, and to grant such additional liberties, &c. for the
public good as might be deemed expedient.

Corporate.

The then bailiffs are confirmed in their offices—and in
future, the bailiffs and capital burgesses were yearly to elect
two of the fifteen capital burgesses to be bailiffs.

The then fifteen capital burgesses were likewise confirmed,
and were to be called the common council. If any vacancies
occurred, the capital burgesses were to supply them from
the more worthy burgesses AND *inhabitants* of the borough,
or from the more honest and discreet of the *inhabitants* of

Vacancies.

Charles II. some of the villages lying in the county, but within two miles
Bridport. of the borough, who should be willing to take the office.

A general confirmation follows of all previous charters—and provision is made that no writ of quo warranto should be issued for any thing previously committed—and all the officers were to take the oaths prescribed—and no recorder or town clerk was to be sworn into office without the approval of the king.

YORK.

1676. The king also, after *confirming all former charters to the mayor, and commonalty of York*, granted that neither his treasurer, chancellor, barons of the exchequer, attorney nor solicitor general, should *prosecute any writ or summons of quo warranto* against them or their successors, for any causes, or offences by them done.

Mayor. The mayor is appointed *the king's escheator, and clerk of the market.*

Justices. And the mayor, recorder, and aldermen, are directed to be justices of the peace, and the city's counsel, provided they do not exceed the number of two at one time.

It is also provided, that five of the justices might hold sessions. That the mayor, recorder, senior aldermen and city's counsel, are to be of the quorum. That three of the quorum should be present at the gaol delivery, &c. That no citizen, sheriff, or other officer within the city, should be put to any recognition, jury, or inquisition, without, &c.

Commonalty. That the repairs of the walls, bridges, and king's staith, should be upon the *commonalty*, and *the money to be raised* by a tax upon the *inhabitants*, &c.

Common council. That the *common council of the city* should from thenceforth consist of *72 persons*, and that *upon the death, removal, or secession* of any common councilman, a new one should be elected within the *space of 15 days after such deaths*, &c.

Residence. It was also provided, that the *aldermen*, and such as had been *sheriffs* of the city, should be *constantly resident* in it, *with their families*; and for absence above the space of *60 days* in any one whole year, without the *license* of the whole

commonalty, should pay *scot and lot*, and all other taxes and assessments; and every alderman who should so absent himself, should forfeit 5*s.* a day above the 60 days; and every person that hath been sheriff, 2*s.* 6*d.*, &c. Charles II.
York.

And no *recorders nor common clerks* should be thereafter elected, nor admitted without the approbation of the king, though chosen by the whole *commonalty*, &c.

CINQUE PORTS.

Charles II. also granted a charter to the Cinque Ports, 1668.
which commences by reciting, that the towns and ports of Hastings, New Romney otherwise Romene, Hythe, Dover, Sandwich—had from time immemorial been the Cinque Ports.

That the towns of Rye and Winchelsea had been ancient towns, within their liberties.

That the town and *livery* of Pevensey, Seaford, Bulverhithe, Petit Iham, Hidney, Beaksbourne, and Graunge, had ever been members of the town of *Hastings*. Livery.

That the towns of Bromehill, Lydd, Old Romney, Denge-marsh, and Oswaldstone, had also been members of *New Romney*.

That the town of West Hythe had ever been a member of the town of *Hythe*.

That the towns of Folkstone, Faversham, Margate, St. John's, Goresend, Birchington Wood, and St. Peter's in the Isle of Thanet, Kingsdowne and Ringwolde, have ever been members of the port of *Dover*.

That the towns of Fordwich, Deal, Walmer, Ramsgate, Stoner, Sarr, and Brightlingsey, had ever been members of the port of *Sandwich*.

And the town and hundred of Tenterden a member of *Rye*.

That the barons and *inhabitants* having by charters, pre-
scriptions, and customs, enjoyed various franchises, &c., the king desired that the navy of the Cinque Ports and members might not perish or fail; and in consideration of the services which had been rendered to him, he confirmed all the charters which had been granted to the barons of the Cinque Ports and their *heirs*—to the *men* of the Cinque Ports—or to Barons.
Inhabitants

Heirs.

Charles II. *any calling themselves of the liberty of the same, &c. &c. &c.,*
 Cinque Ports. 1668. *or by whatsoever incorporation, or by pretext of incorporation*
they had been known or named, and all liberties they had
previously enjoyed.

That there should be in the ancient towns and members, &c., a court of record, *with the same powers as every borough or city in England enjoyed.*

Justices of the peace are then appointed. Also that two or more of the mayors, bailiffs, jurats, &c., should have power
 Oaths. *to inquire by the oaths of good and lawful men of the*
 Cinque Ports, of all manner of felonies, &c., and that every mayor, jurat, and commonalty, should receive, to their own
 Fines. *proper use and commodity, all manner of fines, issues, &c.*

That the barons of the Cinque Ports, and the towns of
 Scot and lot. Rye and Winchelsea, might impose, as often as it shall seem reasonable, rateable taxations, as *scot, shot and lot*, tollage, and other reasonable taxations, commonly called common fines, &c., upon the goods, &c., of all and singular the *inhabitants* and *residents*, or occupiers, or tenants, within the ports or members of the same. Provisions then occur that the charter of Henry VI. to Faversham, should be exempted from the confirmation contained in this charter, and that the elections of recorders or common clerks should be void, if disapproved of by the king.

POOLE.

1668. A charter was also granted at this period to *Poole*, which, after confirming all former privileges to the mayor, bailiffs, burgesses, and *commonalty*, recites that the town had been
 Inhabitants *of old incorporated* by the name of mayor, bailiffs, burgesses, and *commonalty*, and that the burgesses and *inhabitants* thereof, as well by that name as by other names, had used and enjoyed divers privileges; incorporates them, and gives the power of choosing a recorder, to the mayor, bailiffs, burgesses, and *commonalty*.

1675. Seven years afterwards, a quo warranto issued against the corporation, and their franchises were seized into the hands of the crown.

Three years after which, the burgesses and *inhabitants* Charles II.
presented an address and submission to the king, praying 1678.
that they might be restored to their franchises.

GLOUCESTER.

Gloucester, which had received charters in the reigns of Henry II., John, Henry III., Richard III., Henry VII., Henry VIII., by whom it was created a city, Edward VI., Elizabeth, James I., and Charles I.—received another from Charles II. in the 23rd year of his reign, which after reciting 1672.
that the charters given to the *citizens* by him in the 16th year of his reign, had been *surrendered*, granted that the Surrender.
citizens, burgesses, and inhabitants, who at the time of the Inhabitants
surrender were *burgesses* or *freemen* of the city, should be Incorporated.
incorporated by the name of the mayor and burgesses of the city of Gloucester, with all the usual corporate powers, &c.
A recital then occurs, that ever since the memory of man there was a custom within the village, borough, or city, that *certain capital burgesses*, in number sometimes more, sometimes less, *who by the rest of the burgesses were thought most discreet*, were chosen into the common council of the borough. Common council.
That at the petition of the mayor and burgesses, intending and designing to reduce the number of the capital burgesses to a greater certainty, the king granted, that for the future, there should be 30 capital burgesses at the least, and not Thirty.
more than 40, who should be named the common council; that 12 of them should be named *aldermen*, and one of the Aldermen.
12 be called the mayor, &c.

That Richard III. had ordained, that there should be a yearly election made, as well of the mayor as of the other officers, by four and twenty electors, viz. by the twelve alder- Leet jury.
men and twelve other of the most loyal and discreet burgesses; which words being subject to an uncertain and doubtful construction, the king granted that the mayor, &c., should be elected upon Monday next following the feast of St. Michael, &c.

That if any one or more of the aldermen or burgesses of the common council, whether he be *inhabiting* or *resident*

Charles II. within the city or WITHOUT, should be elected to the office of
 Gloucester. mayor, alderman, bailiff, chamberlain, &c., and should refuse
 1614. to enter upon the duties of such office, that then the mayor,
 Refusal. aldermen, and common council should inflict such fine and imprisonment as they might deem expedient.

The reader will perceive in this charter a direct confirmation of the doctrine, that the *select bodies* were appointed by the *delegation* of the body at large.

Nor will it be overlooked, that this is the first time in which the non-residence of the aldermen is expressly recognized by charter: and it must be remembered that this is subsequent to the statute of corporations, and to the violent removal and admission of officers—first by the House of Commons, and afterwards by the commissioners under that statute. And, in the latter instance, many of the persons introduced into the corporations were the officers of the state and non-residents. We have also before seen, that the clauses for the appointment of officers by the approval of the king had been introduced into the charters.

LIVERPOOL.

1677. The king also granted a charter to *Liverpool* this year, which
 Common council. appointed a *common council* of 60 persons, therein nominated; 30 of whom, together with the mayor and bailiffs, were to have power to elect and name the mayor, bailiffs, common council, and freemen of the town—thereby placing the whole power in their hands.

The burgesses at large protested against this charter, and several of the common councilmen nominated refused to act under it, and tumults took place in the town. But the spirit of the times stifled all opposition; and the common council continued to exercise the whole authority till the charter of William III. introduced other regulations.

1679. The proclamation for the restoration of corporations by James II., in the fourth year of his reign, seems to recognize this as a period in which great irregularities in the granting of charters were introduced. Indeed, it was about this period

that the clause for the removal of the officers of the corporation at the will of the king began to be inserted;* and therefore King James, in order to satisfy the people in this respect, annulled those charters and incorporations, and in pursuance of the power therein reserved—by order in council and under the sign manual—removed and discharged all the officers in those corporations from their offices.

Charles II.

1679.

Hume says of the parliamentary elections at this time, (though not with strict accuracy,) that they were, perhaps, the first in England, which, since the commencement of the monarchy, had been carried on by a violent contest between the parties, and where the court interested itself, to a high degree in the choice of the national representatives.†

Hume.

However, he is perfectly correct to this extent, that it was in the close of the reign of Charles II. that all municipal rights and privileges were swallowed up in the general doctrine,—that they depended upon charters of incorporation: and these charters were seised, surrendered, granted, and annulled, as pleased the king to answer the purposes of the elections.

WOOTTON BASSET.

A charter, in 1679, was also given by the king to the borough of *Wootton Bassett*, which commences by reciting, that it was an ancient and populous borough, and that the mayor, aldermen, and *burgesses* had enjoyed liberties, &c., *Burgesses*. by charters, prescriptions, and customs.

1679.

The king then proceeds to grant, that the borough should be a free borough, and that the *inhabitants* of the same should be one body *incorporate* and politic, and by the name *Corporate*. of "the mayor, aldermen, and *burgesses* of the borough of *Wootton Bassett*," should plead and be impleaded and have the other usual corporate powers. The then mayor, aldermen, and capital *burgesses* are named and confirmed in their

* In the 25th of Charles II. it was said in a case at law, that "it had been better to adjudge the king deceived, than let in a deluge of mischief."—*Thomas v. Sorrel*, 3 Keb. 146.

† Hume's Hist. of Eng. viii. 93.

Charles II. respective offices, &c. A general confirmation of all liberties, &c., and that the common clerk of the borough should be approved of by the king, closes this charter.

**Wootton
Basset.
1679.**

In this place the right of election has always been exercised by the *inhabitants paying scot and lot*, although a *corporation* from this time existed in it.

**Scot and
lot.**

WELLS.

1683. This king, at the petition of the late mayor, masters and burgesses of the city or borough of *Wells*,* granted, that it should be a free city or borough of itself; and that the burgesses, by *whatsoever name or names they or their predecessors had been incorporated*, might be from thenceforth one body corporate and politic in deed, fact and name, by the "name of the mayor, aldermen and *burgesses* of the city or borough of Wells, in the county of Somerset."

Burgesses.

Corporate.

The usual corporate powers, with provisions for the election of the municipal officers, are then granted—and that the Privy Council should have power to remove any of the corporate officers.

That every person admitted into the liberty of the city or borough should before his admission, take certain *oaths*, &c. before the mayor for the time being—and that the mayor, aldermen, and burgesses, and their successors, should have all gifts, grants, liberties, &c. theretofore lawfully granted to the mayor, masters and burgesses, or citizens, burgesses, and *inhabitants* of the city or borough, &c.

SANDWICH

1684. Received a charter in the 32nd of Charles II., which commences by reciting, that for the improvement of the port and town, and for the good government of the *people* there *dwelling* and resorting; the king granted, that it should for ever be a free town of itself, and that the mayor, jurats, and *inhabitants* should for ever be one body corporate and

Corporate.

* See in *Knight v. Corporation of Wells*, 1 Lord Raym. 80; Lutw. 506; this charter is treated as superseding the charter of Elizabeth.

politic, by the name of "the mayor, jurats, and common-
 "alty of the town and port of Sandwich, in the county of
 "Kent;" have perpetual succession, &c. &c. &c.

Charles II.
 Sandwich.
 1684.

That there should for ever be one good and discreet
 man, who should be named the mayor, with twelve of the
inhabitants of the town, who should be named the jurats.

Inhabi-
 tants.

That the high-steward, recorder, town-clerk, land treasurer,
 water treasurer, common *wardman*, and 24 men should be
 named the common council.

Common
 council.

That the common council might yearly assemble and nomi-
 nate the *mayor* for the town, and also two of the then ex-
 isting jurats; and after such nomination the jurats, common
 council, and *freeholders* of the town (of whom four jurats,
 and eight common councilmen should be twelve) might choose
 one from those persons so nominated, to be *mayor*.

Mayor.

That when any vacancy occurred among the jurats of the
 town, the mayor, jurats, and common council, should appoint
 a successor from the common council.

Vacan-
 cies.

That the mayor, jurats, and common councilmen might
 nominate from the *inhabitants* of the town, any persons to
 fill vacancies that might arise among the common council.
 And that the mayor and jurats should elect all the future
 high stewards and recorder.

That the recorder should elect one good and honest man,
inhabitant within the town, to be the town clerk.

That the mayor should yearly elect from the common
 council the land treasurer.

That the mayor, jurats and common council should yearly
 elect the water treasurer, and an honest man as common
 warden, &c.

A provision is then inserted, that all the officers of the
 borough should be nominated and elected from the *inhabi-*
tants; and that the mayor, deputy mayor, jurats, recorder
 and deputy recorder should be justices of the peace.

Inhabi-
 tants.

A sessions with criminal jurisdiction is then granted. And
 a provision occurs, that all the officers of the borough should
 be removable at the pleasure of the king in *privy council*.

A grant is added of two fairs, with all tolls &c.; court of

Charles II. pie powder, &c. : and that the mayor, jurats and common
Sandwich. council might make bye-laws. Also of a court of record—
1648. and that the mayor, jurats, &c. might hold lands to the
 amount of 200*l.* per annum, notwithstanding the statute of
 mortmain. And that no person, unless he was mayor, jurat,
 common councilman, or a freeholder within the town, should
 have a vote in any election concerning the body corporate;
 with a general confirmation of all previous liberties.

Free- In consequence of this charter, the freeholders of this bo-
holders. rough have been treated as *burgesses*, and therefore allowed
 to vote in the parliamentary elections.

CAMBRIDGE.

1684. It appears also at this period,* that King Charles II.
 granted that the *burgesses* and *inhabitants* of the borough of
Cambridge, should for ever be one body politic and corporate,
 and by the name of the mayor, bailiffs and *burgesses* of the
 borough of Cambridge have perpetual succession, &c.

SOUTH MOLTON.

As an instance also of a charter granted in this reign to a
 place not returning members to Parliament, the following
 extract from that to *South Molton* is added.

Inhabi- The king recites, that for the melioration of the borough
itants. and *parish*, and hoping the *men* and *inhabitants* will be more
 bound to his service—and at the petition of the *late mayor and*
burgesses,—he granted that it should be a free borough; and
Corporate. the *inhabitants* of the borough and *parish* a body *corporate*,
 &c. That they should have one mayor, a recorder, and 18
burgesses of the *inhabitants*, &c. to be the common council,
 who should have power to make bye-laws.

That the *inhabitants* and *residents* should not be forced to
 serve as mayor, capital burgess, or common councilman,
 without their consent.

And if any mayor, recorder, capital burgess, common coun-
 cilman, or common clerk, remove from their offices, the mayor
 and *burgesses* might nominate others of the *inhabitants*.

* Lutwych, 402.

MUNICIPAL DOCUMENTS.

During the period, of which we have already given the legislative enactments, and the charters of the crown, the following facts connected with the municipal institutions should be recorded.

POOLE.

We have before pointed out interpolations made for the purpose of giving colour to the right of the select bodies.* 1654.
The books of Poole present a similar appearance. Singular *erasures* and *alterations* being made in them;—some apparently during the commonwealth. Erasures.

In 1654, an order respecting the internal regulations of the town was originally entered, as made by the “bailiffs, burgesses, and commonalty;” but the word “burgesses” is struck through with a pen, and the word “commonalty” imperfectly erased; the word “burgesses” being written over it.

Another passage of the same date appears to have been originally entered, as made with the consent and advice of the “bailiffs, burgesses, and commonalty;” but the words “and commonalty” are partially blotted out, and above, between the words “bailiffs, burgesses,” the word “and” is interlined in different ink and hand-writing—making the entry to read as made by the bailiffs and burgesses.

1661.

In the 13th of Charles II. there is an entry of an order by the mayor, aldermen, and burgesses of the town then present, on the day of the election of the mayor and other officers in full assembly, which seems originally to have stood thus—“that no person whatsoever should from thenceforth be ‘made’ a burgess, without the consent of the mayor, three aldermen, and eight burgesses, of the inhabitants of the town, to be then and there present.”

The word “*other*” is interlined between the words “eight” and “burgess,” and “*of*,” written after the word “burgess,” is struck through with a pen; after the word “town” there is another obliteration, and then follow the concluding words.

* Vide East Looe, Winchester, Colchester, Queenborough, &c.

Charles II.

Poole.

It is difficult now to trace the design of these alterations, or the means by which they were effected ;—but the probability is, comparing this alteration with the former, that originally the entry required the consent of eight *burgesses of the inhabitants* ; which has since been changed to support the right of the select body, by making the “ *burgesses* ” appear to be of the same class as the “ *aldermen*,” simply describing them as “ *inhabitants*.”

1668.

In another entry it is expressed, that the *mayor, aldermen, burgesses and commonalty* obliged themselves to pay a salary to Mr. Hardy, their then minister ; but the words “ *and commonalty*,” are partially erased, and the entry signed by fourteen persons.

LIVERPOOL.

Portmote. It appears in the books of *Liverpool*, that the ancient *portmote court*, which ought to have been held after Christmas,

1647. 1647, was adjourned, in consequence of sickness and infection existing in the town.

In the year after the passing of the corporation act, several of the aldermen and common councilmen, together with the common clerk, were removed from their offices by commissioners appointed under the statute of the 13 Car. II., for refusing to take the oaths therein prescribed.

1662.

Common council.

The common council, thus purified by the commissioners, seem to have formed a plan for vesting in themselves and their associates all the powers of the corporate body, independently of the *burgesses*, which they accomplished by obtaining from Charles II., in the 29th year of his reign, the charter of which we have before given the substance.*

It appears, from the proceedings at Liverpool at this period, that the common council took upon themselves to order that a levy of 60*l.* should be assessed on the *inhabitants* ; so that the select body, constituted by the charter, appear to have assumed the power of taxing the inhabitants :—which, to say the least of it, is very questionable, both in a legal and constitutional point of view.

* See before, p. 1704.

A few years afterwards it was ordered, "that *foreigners* should not be made free of the town without the *consent of the corporation*:"—from which the inference would be, as we have urged with respect to other places, that the rights of Liverpool were intended to be enjoyed by the *inhabitants*, and not by *strangers*. And it should be remarked, that the consent here referred to is that of the *burgesses at large*, or the *commonalty*, under the name of the corporation. For notwithstanding any general opinion, or any practice to the contrary, it is impossible to assert that the *burgesses at large*, or the *commonalty* were not the corporation—and to contend that the *common council* were, is something so unreasonable, and so directly in opposition to the general law and practice, and the words of the charters of this particular place, that it is impossible it can for one moment be maintained—but we shall have occasion to refer again to this point hereafter.

Charles II.

Liverpool.
1676.
Foreign-
ers.Inhabi-
tants.

Whether it was on the ground of the whole corporation of the burgesses of Liverpool claiming a right to interfere in the business of the town, or upon what other ground, would now be difficult to say; but it seems that Liverpool was thought not to be sufficiently dependent upon the court: and in this year Chief Justice Jefferies demanded on the part of the king, a surrender of the charter, which was delivered up to him, but soon after returned to the mayor:—with what understanding or promises, cannot now be discovered.

1684.

ROCHESTER.

At this period there are some bye-laws respecting the city of *Rochester*, entered in the proceedings of that corporation, from which a few extracts may be desirable. They provide, amongst other things, that if an alderman or common councilman should solicit a *freeman* to give his voice for any particular alderman to be mayor, he should lose 40s., and be dismissed from his place. And if a freeman, or other *inhabitant* of the city did the like he should forfeit 20s.; and, if a freeman, should lose his freedom. If any alderman should set himself up to be mayor, and be chosen, he should

1673.

Inhabi-
tant.

Charles II. bear the charge of his mayoralty, but *have no benefit of making a freeman*.*

Rochester. 1673. No freeman was to give his voice for more than one alderman to be mayor, and *none* but such freeman *as inhabited in the city, hundred and liberty should give such voice*.

Inhabited. No one was to be elected mayor, alderman, or common councilman, unless he commonly *dwelt within the city and liberties*. And if any person not being an *inhabitant* should be elected into any of the offices; or, being an inhabitant at his election, should *remove* from thence, or wilfully absent himself from the city *three months* together, or should not attend at the courts and meetings, he was to be removed from his office.

Dwelt. Remove. No person was to be admitted to the freedom of the city without the consent of the mayor and major part of the aldermen and assistants then present; all other elections being declared to be void.

Foreign-ers. And no *foreigner* was to use the trade of a tailor, shoemaker, &c. &c. or any trade, mystery, or occupation for hire, gain or sale, within the city and liberties, except at fairs and markets.

London. Another bye-law also, apparently in imitation of the usages of *London*, mentioned in the case before quoted,† recited, that by an ancient custom, no person could be admitted to the freedom of the city, unless he had served as an *apprentice* for the term of seven years to a freeman *INHABITING*; or unless he was the eldest son of a freeman *INHABITING* within the city; or had purchased the freedom of the city, to *inhabit and dwell* there, and to take upon himself the execution of such offices within the city as he might be elected unto, and to pay such *public assessments, scots, and duties, as the other freemen and inhabitants*.

Apprentices. Non-residents. That many persons of quality, and clergymen, *not inhabiting* within the city, had been admitted to the freedom

* This appears to allude to a usage which had sprung up in some places of allowing the mayor to make a freeman, without his paying any fine. It is obvious, that such a usage could have no pretence of legality, and, therefore in many places it has been set aside;—London, Portsmouth, &c.

† See before, p. 832, et seq.

by the mayor and aldermen, with many others, being *foreigners and strangers, and not inhabitants*; and *during the time of the late civil wars*, and since, *had unduly been admitted gratis to the freedom of the city, of purpose and out of design to qualify them to give their voices for the electing of citizens to serve for the city in Parliament*. And therefore provisions were then made to confirm the privileges of the freemen inhabiting in the city; and to negative the right of the eldest sons and apprentices of freemen who had not constantly inhabited there. It also *restrained the mayor, under penalties, from admitting any freemen, after notice had been given of the intention of the king to call a Parliament*.

Charles II.
Rochester.
1673.

Freemen.

These bye-laws clearly proceed on the assumption that all the officers of the city, as well as the freemen, should be resident. But it seems an illegal provision, that no freeman should be admitted without the consent of the mayor and major part of the aldermen and assistants: because, as the freemen or burgesses might be admitted at the court leet, which is not a corporate meeting, it is indirectly taking away that power, and limiting it, by the modern rules of law, to those corporate meetings, only, at which the major part of the aldermen and assistants should be present; for unless they were so, they would not be good corporate assemblies.

Residence.

Leet.

The last bye-law seems to allude to the qualifications for the freemen of London, by apprenticeship—birth—and redemption. However, it speaks of the privilege as giving the right of *inhabiting* and dwelling in the city, and imposing the burden of payment of all *scots* and duties. It also repudiates the admission of non-residents, foreigners, and strangers; and refers the admission of such persons to the irregularities which accompanied and succeeded the civil wars, justly attributing them to the intention of giving such strangers voices for members of Parliament. To prevent which the rights of the inhabitants are confirmed; and those who had not constantly inhabited within the city are excluded, notwithstanding they were eldest sons or apprentices.

Strangers.

Inhabit-
ants.

The mayor is also properly restrained from admitting any

Charles II. freeman, after the intention of calling a Parliament is known
 Rochester. —a provision which is in perfect unison with the many deter-
 1673. minations we have before cited from the Journals, by which
 the votes of persons so admitted were rejected.

HUNTINGDON.

Bye-laws. Constitutions, also, for the government of the borough of
 1680. *Huntingdon* are to be found at this period, which are said
 to have been made in pursuance of the charter of Charles I.

Incorpo- They commence with the unfounded recital, that the
 rated. borough had been, *time out of mind, incorporated*, by the
 name of “bailiff and burgesses,” who had been accustomed
 to make constitutions for the good government of the
 borough. The charter of Charles I., appointing the mayor,
 Aldermen, recorder, aldermen and common council to make bye-laws
 &c. is then stated, and provisions are made, that if an alderman
 should *leave his habitation*, and not reside within the
 borough for the space of six months, then every such person
 should lose his alderman’s place.

Leet. That no man should be created a *burgess* but at a *court leet*,
 nor unless he be *sworn* at the same, upon extraordinary occa-
 sions; and every one that should be received as a *burgess*
 Estate. should be of *honest condition*, and of *sufficient estate*.*

Sons. That the sons *born* of burgesses should not be *sworn* bur-
 gesses before the age of 21, or till after their marriage; nor
 unless they were persons of *honest condition* in the judg-
 ment of the greater part of the common council, and *house-*
keepers paying scot and lot.

That if any alderman or *burgess* used any contemptuous
 language in any *leet courts*, or other public meetings, he
 should be fined.

Leet. That if the pavements were not properly repaired, present-
 ment of the default was to be made at the next *leet*.

That no inhabitant of the borough, whether free or foreign,
 should suffer the streets before his house to be unpaved.

Inmates. That no inhabitant was to take any person likely to be
 chargeable to the parish to *dwell* with him, as tenant or in-

* See admissions temp. Charles I., before.

mate, without license from the greater part of the common council.

Charles II.
Hunting-
don.
1680.
Foreigner.

That no person should bring in any *foreigner to inhabit* who might be chargeable to the parish, without giving *security* to the overseer of the poor to save the parish harmless.

That no foreigner who had no right of common, should dig any ground upon any part of the common, without license from the mayor or chamberlain.

A recital then occurs, that the *free burgesses* of the corporation, when they had attained the age of 21, and become *housekeepers*, and none else, had, from time out of mind, common of pasture for commonable cattle, within the waste ground belonging to the mayor, aldermen and burgesses, but of late years the lands had been inclosed, wherein of right the burgesses could not make good title for their common.

House-
keepers.

It was therefore ordained, that every such *sworn burgess*, and widows of such burgesses, should for every year, so long as they continued *housekeepers*, and *paid scot and lot* to the borough, and no longer, keep three milch cows upon the land whereof the borough or corporation were seised in fee.

Sworn
burgesses.

That the mayor, aldermen, and burgesses of Huntingdon had, time out of mind, paid to the king a fee-farm rent for the borough, the greatest part of which was paid from the water-mills. That from time out of mind *all the inhabitants* within the borough had been accustomed to grind at the mills, but that of late some *inhabitants* had forborne so to do; and it was therefore ordained, that they should all carry their corn to the mill, under pain of forfeiture.

There are various other provisions in these bye-laws—but they are not immediately applicable to our present investigation.

It will be observed, that they expressly recognize the jurisdiction of the court leet, and the swearing the burgesses there. And according to the practice of the ancient law, they require that the *burgesses* should be of *honest condition* and of *sufficient estate*. The provisions of the law also with respect to inmates and foreigners are embodied ~~in~~;

Leet.

E

Charles II. and the rights of the burgesses appear, according to the
Hunting- general common law, to depend upon their being house-
dog. keepers.
1680.
House-
keepers.

DOVER.

The records of *Dover* establish that watch and ward was in force at this time within that borough,—for it was ordered, that any freeman wilfully *neglecting to watch* should *forfeit his freedom*.

1677. And that the mayor, jurats, and common council were to set *the watch by turns every night*.

1678. The common assemblies were also still summoned by the
Horn- horn-blowing, according to the custom which was referred
blowing. to in Serjeant Glanville's Reports, in the reign of James I.

PORTSMOUTH.

1662. In confirmation of the observation we have before made
 as to the proceedings upon the statute of corporations,—it
Books. appears that *Portsmouth* has no books relating to the bo-
 rough or court leet, from 1568 to 1662,* at which latter
 period the books *re-commence* with the commission issued
 under the statute of the 13th of Charles II.; the removal
 of many of the officers of the borough; and the substitution
 in their stead of the principal officers of state, and peers and
Non- others, not residing in Portsmouth.
residents.

From hence, notwithstanding the nature of the charters,
Honorary. upon which we have before commented, non-resident hono-
 rary burgesses appear to have been gradually introduced into
 the borough, and were allowed to be *enrolled* and admitted
 as burgesses,—but as it was directly contrary to the import
 of the charters, it was not until, comparatively speaking,
 modern times, that they were allowed to act as burgesses,
 or to interpose in the parliamentary or municipal elections.
 To which effect there is an entry in the borough book of
 1689, by which it is directed, “that their names should not
 be called at elections.”

Commis- The commission commences with a recital, that upon the
sion.

* See case of Monmouth. temp. Geo. I.

Charles II.

Ports-
mouth.
1662.

8th of May, in the 13th year of this reign, an act of Parliament had been passed for the well governing and regulating of corporations,—that in consequence thereof a commission had been issued for the purpose of ascertaining fit and loyal persons to be intrusted for the carrying on of his majesty's service and interest in the corporation of Portsmouth, and for expunging such as were, and had been disaffected to his majesty and his government. The names of the mayor, four aldermen, and 92 other persons, are then ordered to be expunged and expelled from the corporation, and persons are nominated to discharge the duties belonging to the respective offices of the former.

The following account of the books, and the extracts from them, will show the nature of the proceedings in this borough at that time.

James Pearse, surgeon to his royal highness James Duke of York, was sworn a burgess before the mayor and five aldermen. 1662.

George, Duke of Buckingham—the Earl of Oxford—Francis, Lord Hawley — Henry Tichborne, Knt. — Robert Townsend, Knt.—Matthew Wrenn, Esq.—Thomas Chitsley, Esq.—Henry Nowell, Esq.—and some others, were sworn and admitted burgesses before the mayor and four aldermen. 1668.

It may be observed that both of these last elections were bad, not being by a majority of the select body, which consists of 13 or 12, and the presence therefore of seven was requisite.

At an assembly holden at this date at the guildhall, it was put to the question, whether Mr. Henry Perryn should, according to his request, be discharged from his aldermanship; and he was accordingly released therefrom, in regard he had settled himself to live in another place, but was continued a burgess of the borough. 1670.

The entries in the books exhibit lists of the new corporation, beginning with the mayor, after which are added the names of noblemen, baronets, &c. according to their rank, then the aldermen, esquires, gentlemen, and afterwards the names of many persons, included in a general circumflex, 1662.

Charles II.

Portsmouth.
1662.

under this description, "*burgenses infra burgum predictum*," as if distinguished from those mentioned above.

And the aldermen (who appear by the books to have been subsequently appointed) are, with one or two exceptions, elected out of this last description of burgesses.

Non-residents.

In the subsequent entries there appear the names of some non-residents, though the generality of the persons elected burgesses, are not described by their residence at all.

1663.

Richard Fanshawe, knight and baronet, ambassador to the king of Spain, is admitted a burgess:

1664.

Captain John Cox, of *Chatham*; Captain Richard Young, of *Chichester*; and Francis Rolle, Esq., high-sheriff of the county; were also sworn burgesses.

James, Duke of Monmouth, was pleased to accept of a burgess-ship of the town, and was made a burgess,—as was also William Lord Brouncker.

1674.

George Stroud, Esq., one of the benchers and readers of Lincoln's Inn, was sworn a burgess at a sessions of the peace holden the 14th May, 1674.

Thomas Hancock, one other of the burgesses of the borough, hearing Paul Richards *disfranchised*, stood up, and in a mutinous way, in open court, began to question their authority to disfranchise any burgess without the consent of all the others; and slighted the authority of the court; for which offence Thomas Hancock was likewise presently in court *disfranchised*.

1682.

It seems that the borough of Portsmouth had surrendered their former charter to Charles II.; in consideration of which that king made a new grant to the mayor and burgesses. But the surrender was never duly enrolled, and was consequently void.

The charter however, will still afford a specimen of those granted in this reign, particularly subsequent to the forced surrenders:—the substance of it is therefore added.

Charter.

It commences by reciting, [that it was an ancient borough, as well by divers names of incorporation granted by charters of divers kings, as by *prescription*, &c.; and had

enjoyed divers liberties, &c.; particularly by a charter from Charles I. Charles II.

That doubts and disputes had arisen concerning the election of the mayor and other officers of the borough, by reason of an ambiguous expression in the charter, whether all the *inhabitants*, who were not burgesses, ought to elect them from time to time, or not.

Ports-
mouth.
1682.

Inhabi-
tants.

That the mayor, aldermen and burgesses had *surrendered* into the king's hands the charter of Charles I., and all lands, &c., and all other charters and privileges; which surrender he had accepted and approved of; and that they had humbly besought him to create them anew into a body politic, &c. Surrender.

The king therefore granted, that the borough of Portsmouth and town of Gosport should be a free borough; and the several persons thereafter named, should be the *mayor*, *aldermen* and *burgesses*, and a body corporate and politic; and by the name of "the mayor, aldermen and burgesses of the borough of Portsmouth, in the county of Southampton, should have perpetual succession," &c. Corporate.

That there should be *within* the borough one of the most honest and discreet aldermen to be mayor. Mayor.

And there should also be *within* the borough 12 other honest and discreet burgesses, who should be named the aldermen. Aldermen.

That the aldermen should be called the council.

That the mayor, recorder and aldermen should have the power of making reasonable laws, &c. for the governance of the burgesses.

The mayor and 12 aldermen are then named:—and James, Duke of York—Edward, Earl Conway—Daniel, Lord Finch—Edward, Lord Noell—Anthony, Earl Falkland—Lionel Jenkins, secretary of state—Sir Francis North, knight, chief justice of the common pleas—Edward Seymour, esq., privy counsellor—George Legg, esq., master general of the ordnance—Wrothesley Baptist Noel, esq.—Sir Thomas Were, knight—Sir Richard Beach, knight—Richard Norton, esq.—Edmund Saunders, esq. and John Salisbury, gent. were nominated as the first and modern burgesses of the borough. Burgesses.

Charles II.

Portsmouth.
1682.
Mayor.
Aldermen.

It was further granted, that the mayor, aldermen and burgesses should assemble yearly, and nominate two aldermen of the borough, one of whom should be mayor.

In case any of the aldermen should die or be removed, the remainder of the aldermen should appoint other burgesses to the vacancies.

That the *mayor and aldermen* should nominate as many persons only to become burgesses as they should please; and that no other person should be reputed a burgess of the borough, unless he should be in such manner elected.

That the recorder should be elected by the mayor and aldermen.

That the mayor, recorder and aldermen should hold a court of record weekly; also a court *leet and view of frankpledge* of all the *inhabitants* and *resiants*, to be holden before the mayor or recorder.

That the mayor, recorder and three aldermen should be justices of the peace; and that their future election should be by the mayor, aldermen and burgesses.

That the town clerk should be nominated by the mayor and aldermen.

Removal. *Power is then reserved to the king to remove any of the officers of the corporation by letters under his signet.*

This unconstitutional charter closes by granting the assise of bread, &c.—all fines, &c.—goods and chattels of felons, &c. That the burgesses and *inhabitants* should be quit of toll, and not compellable to pay any light-house duties: with grants of fairs and markets—powers to take recognizances on the statute merchant—to purchase and receive lands, &c. not exceeding the value of 100*l.* per annum; and free passage from Portsmouth to Gosport, and to Ryde, in the Isle of Wight, &c.—with groundage and anchorage for all ships, &c.

The borough was to be holden of the crown at fee-farm, at the rent of 13*s.* 4*d.*; with a reservation of all the rights of the Bishop of Winchester.

The real object of this charter appears to have been to exclude the *inhabitants* as burgesses; and to restrain the corporation to the mayor, aldermen and burgesses mentioned

in it. Express power being given to them to nominate such persons only to be burgesses as they should think fit ; and that none others should be reputed burgesses.

Charles II.

Portsmouth.
1682.Select
body.

All the powers appear to be given to the select body. But still some semblance of the ancient constitution is preserved, for the aldermen and all the other officers are described as "within" the borough, according to the language of the former charters.

The *court leet and view of frankpledge* are also preserved.

Leet.

Nevertheless, in modern times, notwithstanding this charter was repudiated, and not acted upon in other respects, yet the non-resident aldermen, and other officers were allowed, and the burgesses, the greater number being non-residents, were reduced below 50, although there was a population of upwards of 50,000 persons.

Non-residents.

And on a recent occasion, a committee of the House of Commons confined the right to these persons, notwithstanding there appears upon the books an entry very shortly after the granting of this charter, excluding those who were appointed under it from voting.

It is as follows, and is directed to the town clerk :

"Whereas we are advised, that no person or persons that were made burgesses during the charter granted to this borough by King Charles II., *ought to have their vote for election of mayors or any other magistrates* within this place. These are therefore to direct and require you, so often as any election shall be for mayor or any other magistrates within this town, that *you omit the calling* of all such persons as were made burgesses by that charter.

1689.

"Thomas Hancock, mayor."

The names of five other persons then follow.

CASES.

Besides the legislative acts—the royal charters, and the municipal documents—which we have extracted, there are also some few law cases of this period which may serve to show the doctrines then prevalent in the courts of law upon the subject of our inquiry.

1660.

Charles II. A mandamus was directed to the mayor of to
 1660. restore one Tidderley* to the place of a burgess in the corporation. The mayor returned, as a cause of his amoval, that he had requested the mayor to be dismissed from the place of a burgess, which was done accordingly. Baldwin
 Resignation. took an exception to this return, because it did not appear whether the corporation commenced by letters patent or by
 Prescription. PRESCRIPTION, nor whether the mayor, &c. had any power to disfranchise. But the court said, that although the return was insufficient, the party had no cause to be restored; and it was held by Hale, the chief baron, that every *corporation*, as such, can take a resignation.

The court seem in this case to have assumed, according to the then prevalent opinion, that there could be a corporation by prescription. The reader has had an opportunity of seeing how that fact really stands. The same point was also taken for granted with as little foundation in the following case.

Farnham. In a quo warranto against the town of Farnham,† for using a fair and market, and taking toll, &c. It was said by Hale,
 Prescription. chief baron, that a corporation by PRESCRIPTION may be known by two different names, as of “burgenses,” and of “ballivi et burgenses.” But if the name of ballivi et burgenses be a name which they have received within the time of memory, they cannot then prescribe by it, but by their ancient name.

The subtilty of this distinction does not seem calculated to increase the simplicity of the law. And well might it be ranked among the abuses of the time—as we read in the introduction to Jenkins’ Centuries—that “the king’s charters “had been construed too subtilly.”

A case in Keble,‡ shows that the freemen or burgesses of Oxford were admitted at “the *court day*,” which might, without any strained inference, be assumed to be the *court leet*. And yet the King’s Bench held, even without prece-

* Le Roy v. Tidderley, Siderfin, 14.

† The Attorney General v. The Town of Farnham, in Surrey, Hardr. 504.

‡ Townsend’s case, Keble, 458.

dent, that the officers of the borough had a right to refuse admission to an *apprentice* who had served his seven years, notwithstanding, it was justly observed, that such a right might give them the power of engrossing the freedom.

Charles II.
Oxford.
1660.
Appren-
tice.

It was said that there was one precedent of a *mandamus to enfranchise the son of a freeman in Norwich*.

A prohibition was prayed on a custom alleged,* that "all persons who had lands in such a village, but *inhabiting* out of the vill, should pay 4*d.* per acre only in satisfaction of tithes." And that the defendant sued him, *inhabiting* out of the vill, for tithes in kind in the spiritual court. But the prohibition was denied, for the custom is unreasonable to give a *greater privilege to foreigners than to inhabitants*, who are at a greater charge, in respect of their *resiancy*, to repairs and vestments for the church.

1663.
Inhabi-
tants.

The next cases will establish that the *court leet* was still in practice in this reign; and also some parts of the ancient law still in use; particularly as to the *decennas*.

Leet.

A presentment was made at a *leet* for the erecting of a glass house,† which was said to be *ad magnum nocumentum*; but it was held ill, because it should have been *ad commune nocumentum*; and it was further said, that the *leet was the king's court*—that *leets* were granted to the lords as derived out of the *tourn*, for the ease of the *resiants* within its jurisdiction.

1669.

A fine was imposed at a *court leet* for not sending a constable, nor any inhabitant as *decenner* to make suit, according to custom, to discharge the rest.‡

1670.
Decenner.

An action of debt was brought for a fine for refusing to take the *oath* of office of *steward* of the city of Exeter.§

Exeter.
1681.

There is an ancient *court* held before the mayor, bailiffs, &c., and they have not averred that before their charter it was their usage to swear the mayor and bailiffs in that court.

As the shire and ancient court are both mentioned in this

* *Bawdrey v. Bushel*, 1 Levinz, 116.

† 1 Ventris, 26.

‡ *Pierson v. Kiddle*, 2 Keb. 739. § *Mayor of Exeter v. Starrie*, 2 Shower, 158.

Charles II. case, there can be little doubt but that the court referred to was the *court leet*, at which the *steward* is the proper judge, particularly as the party was fined for not taking the oath of office of steward at that court, which a person could not be compelled to take at a court baron; for there it must be optional with the party whether he would take the office or not; but at the court leet, which is the *king's court*, a person might be compelled to take the office, against his will or not; *for every one is bound to serve the king.*

Bye-law. This was also an action of debt for *breach of a bye-law* made at a *leet*,* which claimed a custom to make bye-laws for using and regulating their common.

Common. It was said, that although the *leet* had nothing originally to do with the common, yet by custom it might have such jurisdiction, and that the judges ought to support and favour it, because else they strike at a fundamental principle. As in fines, which had common usage in most *leets*. And if at common law they could not make bye-laws, custom might make it good; it having a reasonable commencement; for at the first purchase and settlement of the common, it might be intended all parties agreed. That *leets* in gross could not meddle with common; but that *leets* which appertained to hundreds, with privilege by custom to govern, is sufficient to give jurisdiction.

It was urged, that the custom was not good, because *leets were to meddle with keeping the peace only*; and a court baron might as well be entitled to pleas of the crown—and if a *leet* could make one, a court baron might make another.

Leet. But the custom was affirmed.

Return of writs. In most of the charters, from the earliest time, we have seen the privilege granted of the *return of writs*, upon which in truth, the exclusive jurisdiction of the boroughs was mainly founded. The following case will establish what the opinions of the court were upon this point, in the reign of Charles II.; and how much the real grounds and nature of these privileges were then forgotten. It is, nevertheless, a

* *Earl of Exeter v. Smith*, 2 Keb. 367.

clear inference from this authority, that the privilege of the return of writs was a distinct proof of a borough being separated from the county. Charles II.
Exeter.
1681.
Separate.

In an action brought by Sir Robert Atkyns v. Holford,* Lord Chief Baron Hale said—"Return of writs I always took to be one of the most pernicious liberties to the common justice of the kingdom."

That return of writs was a superadded liberty though the hundreds were granted, yet the sheriff might, and must still return the writs executed there.

That a grant to have return of writs in a county is void, for in effect it taketh away the office of sheriff. And in the case of the town of Berwick, a grant to them that they should be a county, without a grant of having a sheriff, was adjudged to be void, because there would be no officer to execute and do justice.

The object and nature of exclusive jurisdictions may, in some degree, be learnt from the case of Fisher v. Batten.† Exclusive
jurisdiction. Sir William Jones stated, that counties palatine had their original from a politic reason. And Lancaster, Durham, and Chester, were made so because they were adjacent to enemies' countries, viz., the first two to Scotland; and the last to Wales. So that the *inhabitants having administration of justice at home, and not being obliged to attend other courts*, those parts should not be disfurnished of *inhabitants*, that might secure the country from incursions.

The following case as to *Rye*, one of the Cinque Ports, Rye. may be useful to show the confusion in which the inquiries respecting municipal officers, and the burgesses of boroughs, had at this time been involved; and it will illustrate the common error to which we have before alluded, that there could legally and correctly be two classes of burgesses existing for different purposes.

It will, however, be observed, that the freemen are required to join in making all bye-laws, and in all assemblies, Freemen.

* 1 Ventris, 309.

† Fisher v. Batten, 1 Ventris, 155.

Charles II. and it is expressly added that *all the inhabitants are free*. It is true that a distinction is afterwards attempted to be made between the different classes of freemen ; but which, for reasons previously given, cannot be supported.

**Rye.
1681.**

An information was filed for a riot committed at *Rye*.* The **Mayor.** question was, whether the *defendant* was *legally elected mayor* ; which depended upon this. Four who had given their vote for the defendant, had been put out upon the act for regulating corporations :† and whether they were incapacitated to vote according to the custom of the place, was the dispute. The custom being, that the mayor is chosen by the major number of *freemen* ; but if they be equally divided, then by the jurats.

The freemen choose the freemen, and not the mayor or jurats ; only the mayor hath the prerogative to choose one **Freemen.** freeman, who is called “ the mayor’s freeman.” The freemen must join in the making of all bye-laws ; nor can an assembly (as they call it) be holden without them. All the *inhabitants* of *Rye* are *free there*, and *pay no toll* ; but the freemen, so called, only choose the mayor and burgesses of parliament, and assent to bye-laws ; so that, though they are called freemen, yet they are *common councilmen in their nature* ; and this privilege they have by election or descent, for *all the sons of freemen are freemen*. Now the question upon evidence in this trial was, whether this privilege of being a freeman is such an interest or trust for government as is within the statute of Charles II., for regulating corporations. And it was ruled on a former trial, and likewise upon this, that it was not ; but that such persons as have not taken the oaths, &c., prescribed by that act, may, however, vote.

The next two cases will show the nature and extent of the jurisdiction of the Chancellor and Vice-Chancellor of **Oxford.** Oxford :—which being considered at this time upon a plea of conuzance in the Exchequer, in a cause between **Conu-
zance.** Castle and Litchfield, the decision was in favour of the university.

* The King and Tolney, Skinner, 116.

† 13 Car. II. c. 1.

In the case of *Dodwell against the University of Oxford*,* Charles II.
Oxford.
1681. which occurred this year in the Common Pleas, on a prohibition to the Chancellor's Court, it appeared that his jurisdiction extended as well over the laymen, as the members of the university. And a bye-law as to night-walkers was mentioned as having been made in the time of James I., and it was questioned whether it was warranted by the charter of the 13th of Elizabeth or not. Laymen.

In another case it was held,† that matters of freehold were excepted out of the patent to the university of Oxford: and that their court had not jurisdiction as to lands in Cornwall. 1683.

The following case, though somewhat long, may serve to illustrate the nature of exclusive jurisdictions.

In an action of trespass,‡ it was found by special verdict, that letters patent had been granted to the defendant, of an *hundred* in the county of Leicester, and the offices and profits thereunto belonging, with the *execution of all writs* for 21 years, upon which the question was, whether they were good to the *exclusion of the sheriff* from his duty and office of executing writs in his county. 1680.
Hundred.
Sheriff.

Mr. Lovel, for the plaintiff, argued that *all grants of hundreds* before the time of *Edward II.* were good; but those *since* were void. And he said it would not be amiss to observe the *original nature of hundreds and sheriffalities*. It appears in the books, that in King Alfred's time the kingdom was in gross; and then divided into counties and hundreds, and all persons then came within one hundred or another; and then the king's relations had the government of them, and therefore they were called consanguinei—and so are the earls, lord lieutenants, &c. at this day. And afterwards, when the office became troublesome, there were ordained *vicecomites*, which name remains to this day; and the others continue to be called consanguinei, but have no power in the county, having only the honorary name of earls or counts of such or such a county, &c. And for the Origin of
hundreds,
&c.
Viscounts.

* 2 Vent. 43.

† Vernon's Cases in Chancery, *Stephens v. Dr. Berry*.

‡ 2 Show. 98.

Charles II. better government of the counties, the vicecomites had two courts; but out of those the king granted *leets* and *courts baron*; but *the tourn of the sheriff had yet a superintendant power—they being derived out of it*, as in Dyer 13. And then afterwards the king granted away some hundreds in fee simple, and some franchises; and *the last excluded the king utterly*; but the hundreds granted in fee were not wholly exempt.

1681.
Leets.

On this arose some confusion, and the Parliament thereupon took notice, that the execution of justice was by this much interrupted; and therefore came the statute of the 9th Edward II., “that sheriffs should be sufficient persons;” and have lands in the county; and so to be able to answer “both the king and the country. And that bailiffs and “farmers of hundreds should be sufficient men.” And at that time hundreds were grantable for years. Then came the statute of 2 Edward III. cap. 4 & 5, “that sheriffs “should continue but for one year.” But this took not away the whole inconvenience; for the crown still granted away bailiwicks and hundreds for lives at rents, on such excessive dear rates, that made them endeavour to make up their money by unlawful means, and thereon came the statute of the 2nd of Edward III. c. 12, and the 14th of Edward III. c. 9. By the first it was enacted, that all hundreds and wapentakes *granted by the king*, should be again annexed to the county, and not severed. And by the other statute, that all should be annexed; and the sheriff should have power to put in bailiffs, for which he will answer; and no more should be granted for the future. And one reason of this was, because the king granted away hundreds, and abated not the sheriff’s farm.

Now this grant contains all profits of courts, and the officers and bailiffs thereof. I conceive the *grant of courts is not good*; for the statute of the 31st Edw. III., c. 4. *calls it the sheriff’s tourn*; and in the 6th of Henry VII., fol. 2, *it was adjudged not to be the king’s court*. In Mitton’s case, 4 Rep. the county court is said to be the sheriff’s court; and the *king cannot grant away the office of clerk of the*

county court; but the sheriff ought to have the disposal thereof. And in all writs to the sheriff for making proclamations, they say "in comitatu tuo." And so is the style of the court "*curia comitatus: vicecomitis*," &c. and so it is called in the statute of the 32nd of Henry VIII., c. 13.; therefore the king cannot grant them from the sheriff. For the offices; if the courts be the sheriff's, then the offices must likewise be his.*

Charles II.
1680.

The fines and other profits of his court, I conceive, cannot be granted from the owners. We find in the first of Edward III., c. 2, that *amerciements in the tourn shall be to the use of the sheriff*, although the estreat be not returned till the year be out:—for they are the cause of his being answerable over.

Tourn.
Sheriff.

As to the bailiff, his office is not grantable away—for all escapes by the bailiff are escapes by the sheriff, and he is responsible, unless in case of franchises and liberties; he is answerable for bailiffs in fee.†

Bailiff.

In this case the king hath granted the *bailiffship* for *twenty-one years*,—and the sheriff cannot engage him to give any security, and yet he is bound to answer for him. By the statute above-mentioned, a bailiff is not to continue in office above one year.

The last thing is the custody of the hundred, and this is a branch of the highest concern in the whole patent. Now this grantee hath not the means or power to keep the hundred as the *sheriff* hath, *who can raise the posse of his whole county in his aid of any one part thereof*; this grantee cannot do so without warrant of the sheriff:—so that it is not in his power to preserve the peace, as it is in the sheriff's, who hath by his patent the custody of the whole county.

Hundred.

I agree, the *king may determine the office of a sheriff as to the whole whensoever he pleases*—but he cannot determine the office as to part; because it is entire; unless he divide the county and make more sheriffs, which he may do.‡

Sheriff.

By the statute 14 Edward III., all hundreds (except such

Hundreds.

* Scrogg's case, Dyer, 175.

† Bro. Franch. 24, Dyer, 24, Fitzh. 22.

‡ 4 Inst. 267; Sir John Fould's case, 1 Car. I. 18.

Charles II. as were then granted in fee) are rejoined to the bailiwicks
1680. of the counties : and *all grants of the bailiwicks of hundreds made since that statute, are void* ; and the making bailiffs thereof belongs to the sheriffs, for the better execution of justice and of his office. And so it is resolved in Sir John Fortescue's case. And for these reasons—and on those cases—I conclude the grant is void.

Mr. Bigland, *à contra*.—For the validity of this grant, I think it good ; the reason of Mitton's case in 4 Rep., is particular, because of the entry and custody of the rolls, for the embezzling whereof the sheriff is answerable.

**Separate
counties.**

But to consider what the king's power was at the common law as to the constitution of a sheriff—see 1 Roll. Rep. 118—he can make two sheriffs, as he did for Buckinghamshire and Oxfordshire, which had formerly but one sheriff; and so for Leicestershire and Warwickshire.

**Return of
writs.**

The king may grant the *return of writs* to a vill, which takes not away the sheriff's general jurisdiction, but only his immediate jurisdiction. The king hath granted court *barons*, and *hundred courts*, which by his letters patent are *derived out of the tourn*, and so diminish the sheriff's profit, 2 Inst. 11. And the courts have settled in Westminster Hall, that he may grant to one to hold pleas within a certain precinct.*

By the common law the *hundred* belongs to the *king of common right* ; and whosoever will claim it must derive it from the crown.†

Now for the statutes : Those which concern this matter are found in the special verdict,—and the penning of them will determine it.

Hundreds. The first statute extends only to those hundreds let by King Edward II., and leaves the rest at liberty. As for the 14th of Edward III. it is thus, “all wapentakes and hundreds “which be severed from the counties shall be annexed, &c.”—and this is relative to the former. Upon the reading hereof it plainly appears it cannot extend to all.

And it is a general rule : *where ancient grants are dubious,*

* But as to an hundred, see 8 Hen. VII. fol. 2 ; 13 Hen. VII. fol. 2 ; 1 & 2 Hen. VII. fol. 167.

† 11 Hen. IV. 90. 2 Roll. Abr. 73. 13 Hen. IV. 9.

they shall be construed and expounded according to usage. Charles II.
 And here is no damage to the subject:—for the same 1690.
 remedies are by the statute made for bailiffs as for sheriffs;* Usage.
 and if there be any defect in them, the sheriff hath still a Sheriff.
 power to superintend it.

Where no grant has been made since these statutes, you will intend they were let by Edward II., and so are annexed to the counties by those statutes; but those which have been granted since, are not within it: and this was granted by Edward IV.—The case was adjourned, and in Easter Term, 34 Charles II., the grant was resolved *void*.

To conclude these cases we shall add only two, for the purpose of showing how much the Court of King's Bench at that period yielded to the times; and adopted, in support of the unconstitutional extension of the prerogative of the crown, the practice of supporting the select bodies, and arbitrary removals, which the House of Commons had unjustifiably assumed during its usurpation:—and two others to establish that the citizens of London continued the same class of persons as they were described to be in the case of Waller and Hanger, in the reign of James I.

Thus it was held, that the election of magistrates by the common council of a corporation, (without the voices of all the commonalty, as some charters direct,) is good where it has been so *practised* a very *long time*;† for the law presumes, that in some former age, the whole commonalty assented to it, although that assent cannot be shown at present.

Such election by the common council is expedient to avoid confusion. And corporations have a power to make ordinances for their own government.

That a *practice* which has existed, even for a long time, Practice.
 should give a *right*, is, to say the least of it, a very loose and unsatisfactory doctrine: and cannot be the law; unless it is meant to be assumed, that the charters were doubtful, in

* 2 Cro. 551; 1 Roll. Abr. 349.

† Jenkins, 6 Cent. 273; 4 Co. 77; Dav. 446; Lane, 21; Hob. 15; 3 Bulst. 71.

Charles II. which case usage might explain them, and to that extent be evidence of right.

Nor can the other position, as stated above, be supported.

Bye-laws. For the whole commonalty could not have legally assented to a bye-law for such a purpose, if it was contrary to the charter—they might *delegate* the power pro tempore, or pro vice, but not part with it altogether, if granted to them.

1669. In Braithwaite's case,* to which we have already referred,† it was declared by three of the judges, "*that the king and council might disfranchise any member of a corporation.*"

1666. In the case of Sir William Waller v. Sir Giles Travers,‡ it was said that "he who enjoys the privileges of London must be *civis et liber homo—free of the city, and an inhabitant within the city, and a pater familias.*"§

1668. And in another case, it was, that "*a liber homo must be an inhabitant of London.*"

1666. And a person was committed to custody,|| because, being an *inhabitant* of one of the *wards*, and elected an *alderman* for it, he had refused to take the oath.

PARLIAMENTARY CASES.

In addition to the legislative acts, in which the House of Commons concurred during this reign, there are also some proceedings connected with the return and election of its members, in which they acted alone, and which are necessary to be inserted—as proving who, by parliamentary usage, were treated as the *burgesses*; which ought to have corresponded with the municipal practice of the boroughs.

1660. At this period the indentures of returns of members to Parliament for *Worcester, Lincoln, East Retford*, and other boroughs,¶ were made between the sheriff of the county of the one part, and the mayors and burgesses of the other; the members having powers to act for themselves, and the *commonalties* of the boroughs. The word *inhabitants* not being used as in those of 1654.

* 1 Vent. 20.

† P. 246.

‡ Hardr. 30.

§ 2 Keble, 372.

|| Swallow v. Citizens of London, Sid. 287.

¶ From the indentures of Returns at the Tower of London.

And the course of the House appears to have been to reject returns so made; for in the case of *Bury*,* an indenture, signed by the inhabitants, was directed to be withdrawn and taken off the file:—the House going into the contrary extreme, of confining the election to the alderman, capital burgesses, and common councilmen.

Charles II.

Bury.
1660.

BEDWIN.

In the case of *Bedwin*,† the committee properly determined against the right of the inhabitants in general to vote, but correctly found that “the burgesses” at large had that franchise.

We have seen that Bedwin was a borough by prescription;‡ as the borough and the burgesses are both mentioned in Domesday, the entry being similar to that of *Calne*; yet in the latter place the right of being and making burgesses was claimed by the corporation, though they had no charter, and there had been a judgment in quo warranto against them.

Calne.

In Bedwin, in the 16th of Charles I., the right was claimed to be in the bailiffs, portreeves, and ancient burgesses, but which was contradicted on the other side, it being urged that the *inhabitants* paying scot and lot were the burgesses who ought to return.

1640.
Bedwin.

The committee “not being satisfied that it belonged to the ancient *burgesses* by prescription, remitted it to the inhabitants paying scot and lot.”

Right.

To reconcile, therefore, these two decisions as to Bedwin, it must be assumed that they each correctly meant to give the right to the “*burgesses*,” who were the *inhabitant householders paying scot and lot*, and who in that character would be *enrolled* and *sworn* at the *court leet*, of which the *portreeve* would have been one of the officers.

But in the sixth of Queen Anne, contrary to these legal and constitutional decisions, the right was *agreed* to be “in the freeholders and inhabitants of ancient burgage houses”—being another instance in which the *agreement* of the parties appears to have led to a usurpation, which was subse-

1707.

Right.

* 8 Journ. 25.

† 8 Journ. 33.

‡ Vide ante, p. 1478.

Charles II. frequently confirmed in the third of George II., by a determination to the same effect.
1729.

YARMOUTH.

1660. In the case of *Great Yarmouth*, there was also a constitutional decision, rejecting the right of the select number, and properly confirming it in the *burgesses at large*.* The only determination which could have been correctly adopted in accordance with the numerous documents we have before given from that ancient and important borough.

CHICHESTER.

In the case of *Chichester*, a decision was made,† as in some other instances, by which the uncertainty and confusion introduced into this subject by connecting it with corporate privileges is distinctly manifested.

Right. The right was declared to be, not in the *free citizens* alone, but that the *commonalty* had the right together with them; and the mayor having, contrary to precedents and advice, excluded the *commonalty* from voting, was committed to the custody of the serjeant-at-arms.

This determination appears to assume, that there were two classes of persons who were entitled to vote—the *free citizens* and the *commonalty*. We have already shown that such a thing could not properly exist. The only persons who could be entitled to vote, were the “*burgesses*.” And the term “*free citizens*” or “*commonalty*” might either of them be used to describe the “*burgesses* ;” but both could not, if they were separate classes, be included under that name. Some confusion therefore must have arisen in the use of these terms, which it would not now be material or useful to unravel; it is sufficient to say, that this determination ought to be treated as confirming the right of the *burgesses in general* to vote, and that they should be taken to include, according to the common law, the inhabitant householders paying scot and lot, which, in fact, was the practice afterwards.

* 8 Journ. 35.

† 8 Journ. 40.

TAVISTOCK.

In the case of *Tavistock*,* the committee were led into the error, that the *freeholders* had the right of election,† from its not being contested between the parties. The one side contended that the *freeholders* alone had the right of election: whilst the other insisted upon the right of the freeholders and inhabitants at large:—and the committee decided in favour of the latter; but having once assumed that the right was in the freeholders, (the inaccuracy and ill consequences of which right we have before pointed out, as prevalent in Tavistock;) they were led in the succeeding year, to determine that the freeholders of *inheritance* alone had the right:—excluding altogether the inhabitants, and only deciding the question between the freeholders generally, and those of *inheritance*.

1660.
Freeholders.

Nevertheless, this right thus commencing, was confirmed at subsequent periods, as in the third of William and Mary: and in the eighth year of the same reign, inhabitation and actual possession were added to the qualification of freehold inheritance. In the next year, the further requisite was added of their being presented by the jury of inquiry, at the *law court*. But in 1702, the right of election was determined to be in the freeholders of inheritance in possession, and inhabiting in the borough. The necessity of presentment by the jury at the *law court*, before the *steward*, was again insisted upon, and was found requisite by the committee, but rejected by the House. Taking these decisions altogether, they might, in a great degree, be reconciled with the common law. An *inhabitant* freeholder—in *actual possession* of his house—presented by the jury at the *court leet*, would undoubtedly be entitled to vote. But the error in these decisions consists in confining the right, in consequence of the mode in which the question

Right.

1691.

1695.
Inhabiting
in the borough.
1696.

1702.

Law
court.

* 8 Journ. 42, 334.

† Intricate questions of title arose before the committee; with the ordinary circumstances of *splitting* the property into minute divisions—joint titles—and conveyances, immediately before the teste of the writ.

Charles II. first arose, to the *freeholders*, to the exclusion of the other
Tavistock. *inhabitant householders*, who paid scot and lot.

There is no reason why in this place the right should be confined to freeholders; it stands much in the same position as all other boroughs; excepting indeed that it probably is not a borough by prescription: not being mentioned as such in Domesday. It was originally ecclesiastical property; it returned members from the earliest time, and in the 27th of Henry VI., they were returned in the county

Portreeve. court. The presiding officer was anciently the *portreeve*; and as early as the reign of Edward I., it appears the abbot claimed a *court leet*; and it has never been incorporated.*

1696.

A particular determination of the committee, with reference to this place in the year 1696, should be noted.

Upon the former decision of the last year being quoted as conclusive under the statute, and not allowing any further controversy, it was answered, "that the act did not bind the Parliament, but only appointed a rule for the officer to make a return by, for that, probably there might at some time be a *feignt defence*, or they whose right was concerned "might not be parties, nor heard." Of the soundness and reasonableness of which argument there can be no doubt.

LUDGERSHALL.

As to *Ludgershall*, which is not mentioned as a borough in Domesday, nor is there any charter to it now to be found, but which returned members beyond all question, in the reign of Edward II., and with some intermissions, probably to be attributed to their poverty, from thence to the present time, 1660, when it was decided, upon a question arising whether the
Inhabitants freeholders alone—or the freeholders and *inhabitants* had the right—that it was in the latter.†

1698.

In the tenth of William and Mary, there was an agreement at the election, that non-residents should not vote, and the committee first resolved that the right was in the freeholders and *inhabitants*; but afterwards an amendment was carried,

* See before, p. 522.

† 1 Journ. 42.

"that such persons having an estate of inheritance or freehold, or leasehold determinable on life or lives, within the borough, had the right,"—to which the House assented.

Charles II.
Ludgers-
hall.

In the fourth year of Queen Anne, the right was agreed to be in the "freeholders, or leaseholders for life or lives." 1705.

In the 32nd and 34th of George III., this decision was confirmed, and it was determined, "that the right was not confined to ancient houses, or scites of ancient houses."* 1791. 1793.

No evidence appears to justify the determination that the right in Ludgershall was in the freeholders—the objections to that right we have before stated; and the inconveniences resulting from it; two of which—non-residents and split votes, having actually occurred there.

The variation in these rights also affords a strong inference that they were not founded upon any distinct evidence or principle: and it has been seen that some of them are to be attributed to the *agreements* of the parties.

The reader will remember that the decision as to the term "*burgesses*," meaning, in the charter of *Abingdon*, "*the inhabitant householders*,"† and not the select body, occurred in this year—although, at a subsequent period, an opposite determination was made upon the same word in the charter to *Banbury*.‡

Abingdon.

EXETER.

As to *Exeter*, upon a question arising whether the *freemen* alone, or the *freemen and the freeholders* together had the right, the committee resolved that it belonged to the "*freemen*;" and the member who had the greater number of them was seated.§ 1660.

As the history connected with the *burgesses* of this place is somewhat peculiar, a short statement of it is added.

Exeter is one of the most ancient towns in England, and a borough by prescription, as we have seen it mentioned in Domesday, as well as its *burgesses*, and their houses; their

* 1 Peck. 377, 386.

† See before, pp. 110, 1204, 1210.

‡ See before, pp. 110, 203, 1181, 1201.

§ 8 Journ. 55.

Charles II. residence therefore, within the city may be inferred from that important document.*

Charter. A charter was also granted to it in the reign of Henry II., and confirmations by King John, Richard II., and succeeding kings.

Henry III. gave the city to his brother Richard, Earl of Cornwall.

Returns. It sent members to Parliament from the first returns of Edward I., and has continued to ~~do so~~ ever since. One return, in the reign of Henry VI., being made by the sheriff of the county.

Portreeve. The ancient presiding officer is said to have been, like most other places in the West, the portreeve.

In the 27th of Edward III. the writ requires, in the usual **Burgesses.** form, that the burgesses should send two members for the city, and the return is made by the mayor, bailiffs, and *commonalty*, stating that they had elected two burgesses. There can be, therefore, no doubt but that the *burgesses* formed the *commonalty*.

Freemen. It is true that the *freemen* of Exeter were, as in other boroughs, connected with the borough; because the *being of free condition was a necessary previous qualification for an inhabitant to be a burgess*.

1301. Consistently with which it is said, that in the 28th year of Edward I., the mayor was chosen by the voices of four and twenty persons, described as "*freemen and citizens*."†

1347. In the 21st of Edward III., a dispute having arisen respecting the election of mayor and other officers, for avoiding the like for the future, it was ordered, that from thenceforth no person should be chosen mayor but one who had been tried for the office of *steward* for one year. That officer, generally speaking, presided at the court leet: which, in all probability, was the case in Exeter, because he is described as sworn by a double jury; that is, by four and twenty persons, who were to make their election of him upon oath.

Jury. The reader will not fail to remark the confirmation which

* See before, p. 168.

† Izack's Hist. of Exeter, p. 31.

this affords to the observation we have before made, that the common council were originally the *juris* at the court leet. Charles II.
Leet.
1491.

In the sixth year of Henry VII., there is an irregular admission of persons, as men of the city, who did *not reside* within it. And who, although they might have been of free condition, could not, properly speaking, be freemen of that place, because they did not belong to it. And that this was an irregular proceeding, and was probably one of the earliest introductions of non-residents, is to be collected from this circumstance, that the admission is followed with a declaration, that if they did *not inhabit* within the city, they should not vote for the mayor or any other officer.

Non-resi-
dents.

Henry VII., in the thirteenth year of his reign, issued a mandate to the citizens of Exeter, similar to those we have previously seen in Leicester,* Northampton, Winchester, and Pontefract, respecting the election of their municipal officers: which commences with a recital that great inconveniences and strifes had arisen respecting the election of mayor, four bailiffs, four and twenty of the common council, and four serjeants-at-mace, and that the citizens and *inhabitants* had complained to him thereof. Inhabitants

The king then orders, that there should be four and twenty of the most sufficient and discreet citizens and *inhabitants* of the city to be of the common council for their lives, &c.; and that when vacancies occurred, the remainder should elect other citizens most sufficient and *inhabitants* of the city, &c., according to the custom of London for the election of the twenty-four aldermen. That yearly the mayor for the time being, his brethren and commons that then should be franchised men, should assemble in the guildhall, and the four and twenty, upon their *oaths*, should elect two of the most able citizens of the four and twenty for a mayor; which two names should be shown to the *commons*, who were to elect one out of them. Provisions of a similar nature are then made for the selection of bailiffs and serjeants, &c.: and in the following year, with respect to the service and enrolment of apprentices; which, for the reasons we have given before,

Vacancies.

Commons.

* See before, p. 220, and the observations there.

Charles II. affect the right to freedom under the general law as to *villains*.

1536. Henry VIII., in the 28th year of his reign, granted to the County of city of Exeter a charter, making it a county of itself, and itself. dividing it from the county of Devon, giving all the privileges which belonged to a separate county.

1544. In the 36th year of the same reign, an ordinance was made Men. that all the *men* of the city ought to be present at the mayor's election, and give their voices there, otherwise, without a reasonable excuse, they should be disfranchised.

This bye-law appears to show the real nature of these respective duties: that they were compulsory and not arbitrary: and that a person was bound to attend and vote, was not at liberty to do as he wished in that respect: which latter would be in accordance with the notion of corporate privileges; and the former with the law of the court *leet*, to which alone the compulsory power must be attributed.

1553. In the first year of the reign of Queen Mary, there is an Members. ordinance according to the spirit of the statute of Henry V., that none but *freemen and inhabitants* should be chosen to serve as citizens in Parliament: and accordingly two years afterwards, a person was admitted to the freedom and liberties of the city, and afterwards chosen one of the representatives in Parliament.

Disfranchisement. Instances of disfranchisement are said to have frequently occurred; and the right of cognizance for matters determinable in the court of Exeter was enforced in the reign of Queen Elizabeth.

1640. In the 16th of Charles I. it is said, that any person Marriage. marrying an alderman's daughter, might freely claim his freedom.

1683. In the 35th of Charles II., the king required a surrender Surrender. of the charters of Exeter, which was accordingly given; and a new charter was granted, appointing a set of new officers. And at the same time, the Earl of Bath, who was so instrumental in procuring the surrenders of the charters in the West, was admitted to the freedom of the city.

1687. In the third of James II., an order was made by the

privy council for the removal of the mayor, some of the ^{Charles II.} aldermen, one of the sheriffs, some of the common council ^{Removals.} and the sword bearer. And the deputy recorder, aldermen, common councilmen, and the men of the corporation, were ordered to elect certain persons named to them in the room of those who were removed, without administering to them any oath but the usual oath for the due execution of their offices. 1687.

In the fourth year of James II., the king, by an order in ^{1688.} privy council, recites the proclamation he had made for the restoration of corporations, and that Exeter was one of the places excepted, upon the ground that the surrender had been recorded; but on further examination it had been found that the assumption was erroneous. It was ordered, that all the officers of the city should be removed, and all those who were in those offices should take upon them the execution of their offices, and make such other elections as should be necessary as if no such deed had been made.

In the reign of William III., non-residence had become ^{Non-residence.} so frequent, that it was extending itself to the officers of most of the boroughs: who, however, could not discharge the duties of their offices if they were not living within the bounds of the borough.

An alderman of Exeter had left the place, and absented ^{Alderman.} himself from the duties of his office, for which he was removed; and he applied to the Court of King's Bench for a mandamus to be restored:* but it was held that he was properly removed, for *the nature of the office imported that the person holding it should be both a citizen and an inhabitant*: and a return that he *had removed from the place, and deserted his habitation there, and that he and his family lived without the city*, was held to be sufficient.

In the course of the argument it was said, that "*commorancy went through the whole of that case*;" and that the *party ought to be an inhabitant*, and therefore his *departure from the place took away from him his qualification to be an alderman.*†

* Rex v. City of Exeter, 4 Mod. 33; 12 Mod. 28; Show. 258.

† See Truro case, post. temp. George IV. 3 Barn. & Ald. 590.

Charles II.

And it was ruled, that *the nature of the office of an alderman, and his name, imports that the party holding it should be both an inhabitant and citizen.* And Holt, C. J., said, in conformity with what we have before urged, that “*if he be removed away with his family, he ceased to be a citizen, though he continues to be a freeman,*” for which he cited Moore, 833, *Sir Thomas Waller v. Hanger*.*

And Eyre, justice, said, that “*it was incident to the place and duty of an alderman to assist in the government of the city, and to be resident there for that purpose.*”

And if such residence is necessary upon that account, it must be remembered, that it would be equally so for a Burgess. *burgess*, who has to pay scot and lot—to do watch and ward—and execute other personal services within the borough.

Non-resident.

So entirely was a non-resident considered in that case to have deserted his offices in the borough, that Lord Chief Justice Holt held, that “*it was not necessary to summon such a person. For having ceased to belong to the place, he had no right to expect a summons.*” And in truth the officers of the borough could not summon him, for they had no jurisdiction without the borough; and a summons beyond the limits would in itself be nugatory, and incapable of being enforced; because no fine could be levied, nor committal made, for neglecting to obey the summons. So entirely do all these matters properly depend upon the strictly local jurisdiction.

1628.

In the 14th year of Charles I., the election for Exeter came under consideration, and it appeared that the *common council*, consisting of 24, insisted upon a prescription that they should have nominated four, one of whom the *burgesses* should choose.—That the mayor and 24, nominated one of the candidates, and the commons another; the House seated the former, and rejected the latter, who was elected by the “*magistrates,*” as they are called in the Journal; and it appears that the magistrates, thus defeated in their object, refused to pay the wages to the member whom they had opposed, out of the lands given to the city for that purpose.

* See before, p. 1478, et seq.

The decision quoted above, at the Restoration, excluded ^{Charles II.} the freeholders; and, as far as appears, without any legal ^{Freemen.} warrant, principle, or evidence, gave the right to the *freemen*, a class unknown to the constitution, except as the "liberi homines" of the common law; and did not give it, as they should have done, to the "*burgesses*," whose class, con- ^{Burgesses.} dition, qualifications, and duties, the general law would have pointed out.

After this period, no other decision has occurred respecting the right of election at Exeter, excepting that in the second year of William and Mary, it was agreed, that "no freeholder who lived in the out-county should vote." ^{Freeholders.} From which it might be inferred, that the freeholders had, subsequent to 1660, notwithstanding the determination against their right, by some means or other exercised it, and that this agreement was made only to exclude the non-residents.

And from that time the freeholders have made their claim to vote, but their right has been very rarely exercised.

There can be no doubt that their supposed right was founded upon the fact of their being made a *county*, and that under the statute of Henry VI., they would be entitled to vote. But it must be remembered, that if that statute applied to Exeter, all other persons but freeholders would be excluded, as we have observed before.

Thus has Exeter afforded us in its history, a series of ambiguous, disputable, and intricate facts, all arising from a departure from the simplicity of the common law. If, in accordance with the charters and the returns to Parliament, the "*burgesses*"* only had been always mentioned, the law ^{Burgesses.} would have defined who they were; but by adopting the name of "*freemen*" at one time—which only described one of the qualifications of a burgess—and of "*inhabitant*" at another—which also denotes only a second qualification—the whole is thrown into confusion, and there is no mode

* It has been truly said, that there can be no borough without a burgess: nor a burgess without a borough. 10 Co. 125. Corporation of Lynn v. Payn, 1 Roll. Rep. 118.

Charles II. of escaping from its intricacy, but by uniting the two terms together, and taking a *free inhabitant*, that is, a person of *free condition, inhabiting* in the place, and therefore belonging to it, to be the person described individually by the name of "burgess," and collectively by that of "commonalty."

TRURO.

1660. In this year, the return for the borough of *Truro* in Cornwall was made by the mayor and capital burgesses (the common council); and they were for themselves *and all the people of the borough*, to have full power to consent unto those things which the Parliament should ordain.* The mayor and capital burgesses putting their hands and seals to the return, and the common seal of the borough.†

There are fifteen signatures.

Against this return by the common council there was a petition; and the question was, whether the mayor and 24, or all the *freemen*, had the right of election?

Right. And the resolution was, that "the mayor and 24, without "the *freemen*, had the right."

Freemen. There is no pretence for saying that the *freemen* ever before had the right:—for no such body are mentioned:—excepting merely for the purposes of trade:—which class of

Burgesses. freemen might be resident or not:—the *burgesses*, that is

Lect. the inhabitants who owed suit at the *court leet*, were those who had anciently the right ~~and~~ exercised it:—consequently the committee decided correctly, that the right was not in the freemen:—but they determined erroneously, as has been shown by the previous documents, that the right was in the 24. However it must in justice be observed, that the question of the right of the 24 was brought before them, only as opposed to the right of the freemen.

1661. In this year, there was another petition. The members returned by the *mayor* were ordered to sit until the merits were heard, as being returned by the proper officer.

The question, and the resolution upon it, were in effect the same as those on the former occasion.

* 8 Journ. 69.

† 8 Journ. 306.

About twenty years afterwards, there was a petition of the Charles II.
burgesses and *inhabitants*. 1680.

In 1684, the last year before the termination of this reign, 1684.
the mayor and burgesses granted all their messuages and rents to the king, and *surrendered* all their franchises and Surrender.
charters; accompanied with a petition for a new grant, with such alterations and additions as his majesty should think fit; and they authorized John, Earl of Bath, to present the surrender to the king.

In the first year of the next reign, the Earl of Bath, as 1685.
attorney for the mayor and burgesses, enrolled the surrender in Chancery.

Notwithstanding Queen Elizabeth had granted a charter 1660.
to this place by which the *inhabitants* were incorporated by Inhabitants
the name of the "*burgesses*," and it appears also from the documents relative to the history of it before that period, that the liberties and privileges were enjoyed by the same body:—and notwithstanding the writs and precepts from the earliest times required the election of members to be made by the *burgesses*, yet it will be seen that on the restoration of Charles II.,—when such violences were committed against the constitution, the usurpation of the right of election by the common council, which body was first created by the Common council.
charter of Elizabeth, was in a great degree confirmed; contrary to the decision of the Chippenham case, in the reign of James I.

How opposed this encroachment was to the constitution of that borough, may be collected from the following short history.

No return of Truro purporting expressly to be by the common council of the borough, is to be found till 80 years after the charter; and at this inauspicious period of our history, when a precedent is more likely to throw discredit upon the act, than to give it any authority. Although we have seen in other cases that the usurpations of the select bodies were, generally speaking, annulled, yet they were continued in Truro; and in their subsequent progress seem to have been accompanied with strong marks of fraud;—for in the suc-

Charles II. ceeding return, some word stood before that of "burgess,"
 1660. which has been erased. However, the returns at the close
 Erasure. of the reign of James II., and likewise to the convention
 Parliament, were made by the *co-burgesses*; and the latter
 is signed upon the back by the mayor and 14 *burgesses*;
 though in others the persons sign themselves as capital
 burgesses.

It will appear from the substance of the return of the
 13th of Charles II., that although the election was by the
 "common council," the burgesses were elected for "all the
 people of the borough."

It should be observed, that the question in 1660 was,
 whether the select number of the mayor and 24, "or the
 freemen" should vote, and the decision was in favour of the
 former.

No bur-
 gesses.

It is a curious fact with respect to Truro—Salisbury—
 and other places—that for many years past, for the purpose of
 maintaining the right without question in the select number,
 there has been no body either of the burgesses, freemen,
 or commonalty,—notwithstanding the charter expressly men-
 tions the "burgesses, inhabitants, and commonalty."

NORTHAMPTON.

The decision relative to *Northampton* in this year, gave
 in effect,* the right to the "commonalty," who four
 years afterwards are declared to be the "*inhabitant house-
 holders*:" so that the determinations with respect to this
 place are in accordance with the common law, for the
 result of them is this:—that the right is in the body or
 "commonalty" of the burgesses, viz. the *inhabitant house-
 holders paying scot and lot*, who, by the law of the land, ought
 as "*resiants*," to attend at the *court leet*, and be there *sworn*
 and *enrolled* as belonging to the place, and which being
 a "*borough*," they are its "*burgesses*."†

Inhabitant
 house-
 holders.

The reader should contrast the simplicity of the resolution
 as to Northampton, with the intricacy of those for Exeter
 and Truro.

* 8 Journ. 71. Vide ante, pp. 203, 245.

† See before, p. 1743.

HELSTON.

Double returns being made for *Helston*,* one signed by the mayor, returning Mr. Robinson and Mr. Godolphin; the other by the *sheriff*, returning Sir Peter Killigrew; the former were reported as returned by the proper officer, and that they ought to sit until the merits were determined. The question as to the election was, whether it should be by the *freemen alone*, or by *all the inhabitants*: and the committee reported in favour of the latter. The matter was, however, afterwards ordered to be recommitted,† and it was again reported, that the mayor and *inhabitants at large* had the right; but the House disagreed with that resolution.‡

Right

Inhabitants

Right.
Inhabitants

A striking instance of a repeated correct finding by a committee superseded by the House, probably from some temporary political influence.

ST. IVES.

In *St. Ives* the question was, whether the right belonged to the portreeve, twelve burgesses, or the freemen at large. The committee decided, and the House confirmed, that the latter had the right to elect, or in other words that they were the burgesses.§ In the next year it was determined, that *all the inhabitants* “had the right of election,” which in 1702, was quoted as a decision that it was in the “*burgesses*” at large.

1690.

Freemen.

Burgesses.

St. Ives, like the other Cornish boroughs, is not mentioned in Domesday, nor does there appear to be any trace when it first became a borough.

It did not return members until the reign of Queen Mary, and there is only one other determination respecting the right of election.

The select body,|| who had been defeated in their attempt to obtain an exclusive right in 1660, repeated it in the reign of James II., by obtaining from that king a charter, giving the right to the mayor, capital burgesses, and assistants.

Select
body.

* 8 Journ. 76, 115.

† 8 Journ. 177.

‡ 8 Journ. 203.

§ 8 Journ. 97.

|| 8 Journ. 336.

Charles II. But that charter was repeatedly objected to by the *inhabitants*, and the right of election was contested in the first year of the reign of Queen Anne; on which occasion it was most extraordinarily stated, that St. Ives was both a borough and corporation by prescription:—the former improbable—the latter without doubt untrue.

Burgesses. The question was, whether the right was in the *burgesses* *Inhabitants* or *inhabitants* at large, or the *capital* burgesses.

The petitioner insisting on the former, and the sitting member on the latter.

Usage. Some unsatisfactory parol evidence of a recent usage was adduced; and two returns in the 13th, and one of the 16th of Charles II. by the mayor and burgesses; stating that they had unanimously elected the members.

Sitting member. It was contended for the sitting member, that the term “burgesses,” could only be construed to mean the “freemen of the corporation.” And that those who voted for the petitioner were only “inhabitants.” They produced many returns in the reigns of Elizabeth, James I., and Charles I. Some by the warden and *burgesses*, and others by the portreeve and *burgesses*; and signed only by a few persons, who were proved to be capital burgesses. The charter of James II. was also given in evidence.

Inhabitants The committee resolved, that the right was in the “inhabitants;” to which it was proposed to add the qualification of paying scot and lot; but it was rejected by the House.

It appears almost a perverse error in the committee and the House, that when all the charters speak of the *burgesses* as the objects of their grant, and the parliamentary writs as well as the statutes require the return to be made by the *burgesses*, that they should declare the right to be in the “freemen,” or the “*inhabitants*,” using those new terms instead of the ancient and appropriate name which the law sanctioned. However in substance they are, as here explained, the same. The decision in 1660, for the “*freemen*”—is by that of 1661, explained to mean the “*inhabitants*,” and justly so, because villainage having ceased, the more correct description of the burgesses of a borough is by the term

"inhabitants;" and if the House had been contented to add Charles II.
to that description, which, for the reasons we have given
before, is too general, the further qualification of paying *scot*
and lot—the decision would have been in complete accord-
ance with the common law, and would have been restrained
to the *inhabitants resiant* doing their *suit real* at the *court*
leet.

MICHEL.

As to *Michel*, the question, who were the burgesses, was 1660.
raised upon the point, whether the right of election belonged
to the commonalty at large, or to the 24 claiming by custom :
and they were stated to consist of two *elizors*, and 22 *free-*
men; chosen by the *elizors*. The committee determined that
the 24 had the right.* Right.

This case is somewhat peculiar; the right of the 24 is
asserted upon "*custom*," which, for the reasons we have
given before, could not be applied to such a claim. How-
ever, it is obvious who the 24 were, as they consisted of two
"*elizors*," who were two persons nominated at the court leet Elizors.
to elect the jury—a name and a course of proceeding usual
in Cornwall. The 24 together formed a grand jury, who,
it is stated, were selected from the *freemen*.

The history of this borough may be concisely stated. It
is not mentioned in Domesday; nor is there any reason for
assuming that it was a borough by prescription.

It has no corporation. It did not return members until
the reign of Edward VI. The presiding officer in the
borough is the *portreeve*: and the *steward* of the *court leet*
is mentioned in the Journals.

In the 16th of Charles I. a question arose, whether the
burgesses had the right of election, or all the *inhabitants*.

But the point does not appear to have been expressly
determined, because the sitting members, who were confirmed
in their seats, had not only the majority of the 24, but it is
added, that all the *inhabitants* also condescended to their *Inhabitants*
election.

Charles II.

1640. It is, however, clear, that the 24 persons who in 1660 are called the "*freemen*," were in 1640 called the "*burghers*;" either of which names it is absurd to suppose could be confined to them alone, but there must have been other *freemen* and *burgesses*.

1689. In the first year of William and Mary, the right was determined to be in the lords of the borough, who were liable to be chosen portreeves, and in the *householders*; which latter part of the determination was in accordance with the ancient law, and was no doubt correct.

The lords. That the lords could have any distinct right, is too absurd to be supported for a moment. If they were *inhabitant householders*, they of course would have a right with the others, otherwise they could not; for one class only could be entitled.

House-keepers. In the course of the inquiry in the time of William III., although the resolution is, that the *inhabitant householders* had the right, the evidence all tends to show, that the persons so described were "*housekeepers*," who necessarily must be inhabitants, and therefore, although the term is general, "*householders*," it must in truth mean "*inhabitant housekeepers*." Therefore, about 11 years afterwards, it was properly decided, that the right was in the "*inhabitant householders paying scot and lot*." The last qualification being only added as a necessary consequence, under the common law, of the former. And from the same source the other qualifications of being *sworn* and *enrolled* at the court leet would necessarily ensue.

COVENTRY.

1660. The election at *Coventry* was declared void on account of the uncertainties which arose from the circumstances of many of the voters being polled twice; and many *strangers*, *persons unknown*, *almsmen*, and those that paid scot and lot, being placed upon the poll.* And, for nearly similar circumstances, a like declaration was made in the next year as to Hereford.†

* 8 Journ. 106.

† 8 Journ. 306.

CAMELFORD.

Respecting *Camelford*, it is stated in the Journal*—and 1660.
 is an instance of the inaccuracy with which these terms
 were often used—that the *freemen and inhabitants* had the
 right of election. Right.

We have before shown that it could not be in two bodies.
 The subsequent facts of this case prove, that the committee
 determined, notwithstanding the above statement, that the
 right of election—or, in other words, the right to be bur-
 gesses—was in the inhabitants paying scot and lot. For it
 appeared in testimony, that one candidate had a greater
 number of votes of *freemen* than the other. But for the
 opponent it was shown, that the voters for the former can-
 didate did not pay *scot and lot*, and therefore had no right
 to vote. The committee were of opinion, that the latter
 had the greater number of such as paid scot and lot, after
 deducting from the former the votes of those who did not
 pay; and he was accordingly seated.

HASLEMERE.

We have already seen,† that the right of election for 1661.
Haslemere was at this time determined to be in the “inhabi- Right.
 tant householders.”‡

WAREHAM.

The class of burgesses in *Wareham* was discussed upon 1661.
 the question, whether the right of election was in the
 “mayor, magistrates, and *freeholders* only, or in them and
 all that paid *scot and lot*.” It was determined by the com- Right.
 mittee to be in the latter, with the magistrates and free-
 holders.§

In 1690, the right was *agreed* to be in the “inhabitants 1690.
 paying scot and lot, and the freeholders.”

In 1747, it was resolved to be only in the mayor and 1747.
 magistrates, and such of the *inhabitants* as paid *scot and lot*,

* 8 Journ. 110.

† 8 Journ. 254.

‡ See before, p. 1388.

§ 8 Journ. 271.

Charles II. and in the *freeholders* of lands and tenements who had
 Right. been bonâ fide, to their own use, in the actual occupa-
 tion, or in the receipt of the rents and profits, for a year next
 before the election ; except the same came to them by de-
 scent, devise, marriage, marriage-settlement, or promotion
 to some benefice. A strange mixture of the common law
 right of election for a borough with the statute law relative
 to the election for counties. Nevertheless, the only actual
 error of this determination is, that it omits the qualifi-
 cation of actual *occupancy* as necessary for the freehold
 owner of a house, as observed before in the reign of
 Occu-
 pancy.
 Sandwich. James I., with respect to the bye-law of *Sandwich*. The
 effect of this omission being, that *non-resident* freeholders,
 Exeter. as in *Exeter*, might be thought entitled to vote, which was
 followed by the ordinary effects in this borough.

Wareham is a borough by prescription, being mentioned
 with its burgesses in Domesday ; and in the reign of Ed-
 ward I., it had a view of frankpledge ; and has returned mem-
 bers from the earliest period.

POOLE.

1661. The merits of an election for the borough of *Poole* were
 also canvassed before a committee at this period.
 Report. It was reported, that the first question was, whether the
out-burgesses of the town had voices, as well as the *in-bur-*
gesses :—and the opinion of the committee was, that they had
 equal voices with the in-burgesses.
 The report is very short, mentioning only some of the evi-
 dence upon which the decision was founded. Neither is it
 stated who the out-burgesses were :—whether they were
 Out-bur-
 gesses. burgesses who lived in the *suburbs* just without the walls—
 whether they were burgesses who lived out of the borough
 for some temporary purpose—or whether they were entirely
 and absolutely non-resident. If the first, it is open to
 explanation—if the second, it is not unreasonable, provided
 they had still a domicile in the borough—if the last, it is
 unreasonable, and illegal.

It does not appear that the books were produced : they

clearly existed, as shown before, from at least the 10th of Charles II. Elizabeth.

It seems impossible to infer that the *out-burgesses* alluded to, were persons absolutely non-resident,—because all the documents afford the strongest inferences that the burgesses should be resident.* The grant in the reign of Richard I. 1190. to the *burgesses* of a right of common, is very strong to show that they ought to be so; because such a right could not be enjoyed but by resident householders, as appurtenant to their houses.

The charter of the 11th of Henry VI., containing the license 1432. to fortify, speaks of Melcombe as not a port of *inhabitants*; *Inhabitants* and of Poole on the contrary, as *inhabited* by a great multitude of people, and on those premises the license is granted, —which also raises an inference against *non-resident* burgesses, who could never have been contemplated by such a charter, made with the consent of Parliament. And another charter also of Henry VI. is granted with the like consent 1452. of Parliament to the burgesses and *inhabitants*,†—which seems equally strong against the non-residents, whatever hypercritical inferences may be drawn from those terms.

The vice-admiral's charter in the reign of Henry VIII. is 1527. to the same effect.‡ And the recitals and provisions of the charter of Elizabeth, some of the clauses of which are solely for the benefit of the *inhabitants*, seem considerably to support the same conclusion.§

Either therefore, this determination must be capable of 1568. some explanation from the evidence given before the committee, or from the borough books:—or it is contrary to the charters and records, to reason, and to the general law.

The return on the above occasion was made by the mayor Returns. aldermen, and *burgesses*, *inhabitants*. And in that, and another of the same date, the term “commonalty” is omitted.

It appears from the records of the town, that the corpora- 1661.

* See before, p. 367.

† And see before, pp. 657, 854, 1125, 1239, 1242, & 1246.

‡ See before, p. 1125.

§ See before, p. 1239.

Charles II. tion, about this period, began to exclude the *inhabitants* from their rights, the *erasures* indicative of which disposition have been already given. It will not be forgotten, that it was nearly at the same date that a similar usurpation and exclusion by the corporators commenced in the borough of West Looe.

DOWNTON.

1661. The question as to *Downton* was—whether the out-livers having freeholds, but no houses within the borough, had voices, or, in other words, were the burgesses.* The committee decided in the affirmative. But some members in the House insisting that divers inconsiderable freeholders were *fraudulently created*, whereby a majority had been obtained—the House divided upon the question, whether they should agree with the committee; and it passed in the negative. Which appears to have been a well-founded decision, not only on the constitutional ground suggested, of a contrary decision tending to encourage the splitting of freeholds: but also on the ground before explained with respect to Sandwich and Wareham, and alluded to on this occasion; that if the mere freehold gave the right, there might be no house upon it, and consequently no householder who could be the burgess.

WINDSOR.

1661. As to *Windsor*, we have before shown† that the right was determined at this time to be in the *freemen paying scot and lot*; though at a subsequent period it was decided to be in the *inhabitants* paying scot and lot.

PRESTON.

1661. In *Preston* the question arose, whether the mayor and 24 burgesses only had voices, or the *inhabitants* at large. The Right. committee decided, that “ALL the *inhabitants* had voices,” and the House confirmed the decision.‡

* 8 Journ. 288.

† 8 Journ. p. 292, see before.

‡ 8 Journ. p. 336.

This decision differs slightly from others in using the term ^{Charles II.} "all," from which the absurd inference was afterwards drawn, that every inhabitant had the right without any other ^{Inhabitants} qualification: this being the only borough in England in which such a right prevailed.

We have before shown how inconsistent this is with the general law;* and it is peculiarly inapplicable to Preston, which is a borough by prescription, and the charter was before time of memory granted to the *burgesses*, and confirmed to them in the reign of King John and succeeding kings.

The burgesses also returned members to Parliament from the earliest time; and had a charter of *incorporation* in the reign of Queen Elizabeth.†

Guilds are held every 20 years, for the admission and 1690. regulation of freedoms; and in the intervals *burgesses* are Guilds. admitted by copy of court rolls.

The merits of the election being heard at the bar of the House, the candidate who had been returned by a majority of the *corporation* was defeated. <sup>Corpora-
tion.</sup>

In 1768, the election for Preston was before a committee, 1768. and the counsel for the sitting members insisted, that in the determination of 1661, the words‡ "all the inhabitants," meant such "in-burgesses of the last guild, or those admitted since by copy of court-roll, as were *inhabitants* of the place." ^{Inhabitants}

But the committee would not permit them to give evidence for that purpose, and the petitioner was seated, upon proof of his having the majority of the "*inhabitants at large*."

The same point was again raised in 1781, and the com- 1781. mittee then allowed the petitioners to go into evidence to restrain the right to the "in-burgesses then resident." §

The proof consisted of returns to Parliament, entries in the borough books and papers, and the charters of the borough, together with the testimony of some old persons, natives of the place.

The sitting member also offered some evidence from the

* See before, p. 356.

‡ 32 Journ. 27, 79.

† See before, p. 389.

§ 3 Luders, 225.

Charles II. corporation books, in contradiction to that of the other side.

Right. The committee decided that the words "all the inhabitants" did "*not*" mean the in-burgesses inhabitants only.

The committee expressed their opinion that the right of election in 1661 was too indefinite; and resolved, that "the chairman should be directed to ask for leave to bring in a bill to ascertain the *description of inhabitants* who should for the future have voices in the election; humbly recommending to the House that the right should be confined to all *burgesses resident*, and to all other *inhabitant householders paying scot and lot*."

The report was ordered to be taken into consideration at a future day. The minutes of the proceedings of the committee, and of the evidence, were directed to be produced before the House, which was done accordingly; but on the day appointed for the consideration, it was put off for three months, and no other step was afterwards taken to resume the subject.

The learned reporter of the Preston case states,* that the in-burgesses inhabitant, were apprehensive of something injurious to their claim if the matter were further considered; and previous to the day appointed for its consideration, they distributed a printed case, in which the merits of their claim were stated in objection to the bill proposed. The reporter adds, "perhaps this case, and the opposition of the parties, may have occasioned the order which afterwards passed, and the subsequent neglect of their resolution."

1785. The same point was attempted again in 1785, when it was contended that the right under consideration, and established in 1661, was the right of the in-burgesses, inhabitants at large; and that all the municipal elections before that period were by the "in-burgesses, inhabitants."

They pointed out the absurd result from the general construction put upon the determination of 1661, that it would let in every man who slept a night in the town; and even a whole regiment of soldiers marching through it. The Poole

* Luders, 228.

case and many others were also cited; and they stated ^{Charles II.} the right for which they insisted, to be in the "*in-burgesses* "*inhabitants admitted* at the last guild, or those by copy of "court-roll, admitted since the last guild."

The counsel for the sitting member objected to the admissibility of the evidence which was attempted to be adduced; and cited many cases in answer to those quoted on the other side. ^{Sitting member.}

The committee negated the admissibility of the evidence, and the sitting members were confirmed in their seats.

Thus, contrary to the reasonable and judicious resolution of the committee in 1781, the indefinite and unconstitutional right of ALL the *inhabitants* seems to have prevailed, chiefly owing to a jealousy of the corporate burgesses of having their rights discussed; which in all probability would have led to the establishment of the exclusive right of the *inhabitant householders*, by which means the non-resident corporate burgesses, as well also as the mere temporary inhabitants and lodgers, &c. would have been excluded.

It should also be observed, that the *guild* which was ^{Guild.} held once in 20 years, was only a customary mode of overlooking and correcting the proceedings of the annual courts. And that the court roll upon which the burgesses were to be annually entered, was in point of fact, the roll of the *resiants* at the court leet, for it could not legally be any other.

ST. ALBAN'S.

The general history of *St. Alban's* we have before given.* ^{1661.} It is only necessary to remark here, that at this time a question arose whether the *almsmen* had voices, and strange ^{Almsmen.} to say, notwithstanding there is scarcely any determination of the right of election, which does not exclude the almsmen; and it is so clear by the general principles of the law, that we have always omitted that part of the determination as unnecessary, yet the committee in this case decided they had a right to vote.†

* See before, p. 186. et seq.

† 8 Journ. 350.

Charles II.

It is true, no evidence is reported upon which this determination proceeded; which might perhaps be accounted for by some peculiarity in the nature of the alms.

Without some such explanation, there is no doubt it is a determination at variance with the general law and practice.

CLITHEROE.

Right. We have before stated with respect to *Clitheroe*,* that the right was decided "to be in such *freeholders* only as had estates for life."

SUDBURY.

Right. As to *Sudbury*, the general history of which we have also previously investigated,† upon the question arising whether the mayor, six aldermen, and 24 chief burgesses only, had the right of election, or the common burgesses at large; the committee determined in favour of the former—and the House confirmed that determination.

LUDLOW.

1661. *Ludlow*, the *burgages* of which, and their connexion with the liberty of the town, as well as its charters of incorporation in the reigns of Edward IV. and Queen Mary, have been mentioned,‡ obtained, in 1661, a better fate than *Sudbury*.§

Right. The question arose, whether the right was in the select number of 12 aldermen, and 25 others of the common council, or in them and all the common *burgesses resiant* in the town;—and the committee were of opinion, that all the *common burgesses resiant* had a right of election with the 12 and five and twenty; to which the House agreed.

This, in effect, is a decision founded upon the common law; for a *resiant* who belonged to the borough must be an *inhabitant householder*, and as such be *sworn* and *enrolled* at

* See before, p. 1356; 8 Journ. 357.

† See before, p. 1373; 8 Journ. 360.

‡ See before, p. 527.

§ See before, pp. 968, 1181.

the court leet, and would pay *scot* and *lot*; and being *such*, ^{Charles II.}
 an *inhabitant* of the borough, would be a *burgess*." 1661.

From a document preserved in the Harleian Manuscripts,* there appears to have been, before this period, some distinction between the *burgesses* and *freemen*. However, none such could have existed, excepting to the extent before shown; and therefore the committee, in 1661, properly confined the right to the single class of the "*burgesses resiant*," ^{Burgesses resiant.} particularly as it is stated in the same document that there had been an attempt to introduce *foreigners* as well as *resiants*.

It is also stated in the same paper, that the "12 aldermen and 25 common councilmen began in the time of James I." in this place, as well as in divers other towns, to reduce the election to themselves; which seems to have been the usurpation abolished by the decision in 1661.

The reader will no doubt recollect the numerous places we have before shown in the reign of James I., in which the right was reduced, as stated in this document, to the *select body*.

In the same paper, mention is also made of some of ^{1660.} the *burgesses* not having complied with the law, in taking the *oaths* of fidelity; and also, that some *burgesses* had ^{Oaths.} been made by a charter of James II., whose right was denied; because it had been resolved by the Parliament, that that charter was void and illegal. Some of the *burgesses* were said to have been "*made*" *after the teste of the writ*, and it was answered, that they were entitled by *birth* or *mar-* ^{Birth.} *riage* to demand their freedom, upon paying a small fine. It ^{Marriage.} was urged, that such persons had been kept from their right by the new charter of James II., and as soon as the old corporation was restored, they demanded their rights, and were admitted before the writ came to the bailiffs.

It will be also desirable to add an extract from the books† of the borough of Ludlow, relative to the election of a *burgess*, immediately after the Restoration.

* Harl. MSS., 6806.

† Book, 1648—1680, p. 179.

Charles II.

1660.

"At the New House, the 7th of September, 1660.

"Touching the election of burgesses.

"Forasmuch as it plainly appeareth to the 12 and 25 common council of this town, that there are many able persons called "*chencers*"* within this town, *fit to take the place of burgesses* within the same, and as occasion shall happen *fit likewise to be called into the number of the 25 councillors* of the town, to bear office according to the custom of the same town and good government thereof:—it is therefore thought fit and so *ordered*, that the bailiffs of this town *shall yearly* as occasion shall happen, and as they in their discretion shall think fit, impose upon every *chencer* within this town, *fit† to be made a burgess*, 12*d.* yearly for him to pay for a *chence rent*, and so yearly to double the same rent until such person shall *procure himself to be elected and sworn a burgess* of the town, paying the accustomed fee for the same.

This order is in effect the same as those we have before seen in the Cinque Ports, and in Yarmouth‡ and other places, and compels those who are fit to be burgesses to be *sworn*, which could only be legal under the compulsory powers of the *court leet*. And this is to be done *yearly*, as the court leet and view of frankpledge were held.

In pursuance of the determination thus made in 1661, the returns in the 31st of Charles II. were made by the bailiff and *burgesses*, with the comprehensive additional term of "*commonalty*."

BEWDLEY.

As to *Bewdley*,§ the charter of the third of James I. was cited and considered, and it was determined that the new burgesses only, appointed by it had the right, exclusive of the old burgesses and all others.

* Chencers were those who paid the chence, or certum letæ, for the right of holding the court leet. And in the minister's accounts of the county of Glamorgan, 1 Edw. VI., the word *chence* is stated to be a penny rent, payable by every tenant *inhabiting or dwelling* within the manor or court leet.

† See before, p. 198. et seq.—Yarmouth Leet rolls.

‡ See before, p. 1510.

§ See before, p. 1579.

The direct opposition of this determination to the decision Charles II. of the celebrated committee in the time of James I., in the Chippenham case, has been already noted.

HAVERFORDWEST.

For *Haverfordwest* it was determined, that “the *burgesses* and the *inhabitants* who paid *scot and lot* had voices in the election.* Right.

This determination is accurate in substance, but inaccurate and unintelligible in form.

It purports by its literal meaning, that there were three classes of persons entitled to vote, which for the reasons given before, could not be the case; nor is the distinction with reference to the right of voting between either of them easily to be seen. For the *burgesses* must be inhabitant householders; and then they would come within the two other descriptions; and would necessarily pay *scot and lot*.

The proper mode therefore of construing this decision, would be to assume that these three terms were only different descriptions of the same class of persons, viz. the *inhabitant householders paying scot and lot*, who would be the *burgesses*. Burgesses.

So applied, the determination is intelligible and consistent with the common law; as well as the decisive document we have before quoted in the reign of Richard III.,† where the *burgesses* are distinctly shown to be continually *inhabiting* and *abiding* within the borough.

It must also be remembered, that such a construction is necessary to make the determination correspond with the statute of Henry VIII., under which Haverfordwest first sent members to Parliament. Statute Hen. VIII.

We have previously seen that it had a charter from Edward I.,‡ and another, making it a county of itself, granted by Edward IV., and confirmed by Henry VIII.; and that James I. gave it a charter of incorporation. Charters.

The right of election for Haverfordwest, came before a committee in the second of George I., when it was *agreed* 1715.

* 8 Journ. 491.

† See before, p. 1039.

‡ See before, p. 538.

Charles II. "to be in the *freeholders*, burgesses and inhabitants, paying
Right. "scot and lot, and not receiving alms.

Why the "*freeholders*" should have been added to the former decision, or why the "*inhabitants*" before mentioned should have been omitted, it is difficult to explain: excepting either by the hypothesis, which the endless variety of these decisions would justly warrant, that the committees were guided by no fixed rules:—or unless it is to be attributed Agreement to this being an *agreement* of the parties in which their private interests directed them:—a common incident, as we have before had frequent occasion to observe.

Orders. In the course of this inquiry, several *orders* were given in evidence, made by the mayor, common council, and other
1629. *inhabitants*, from the fifth of Charles I., to the first of
1716. George I. inclusive, respecting the *making of burgesses*, in which the title of sons by *birth*—husbands by *marriage*—and *apprentices* by service, are mentioned, as might be expected, because by the common law those facts were proofs of *free condition*. And it appeared, that these persons were only to be admitted on the *election* days or at the *sheriff's* Sheriff's *tourns*, and at no other time. The latter period is readily *tourn.* explained by recollecting that it was a county of itself, and therefore the *sheriff's tourn* was the same as the *leet*. And in the course of the proceedings, frequent reference is made to the "*court*" at which they should take place.

Burgesses. It is possible that the distinction between the burgesses, and the inhabitants, observable in the determination and agreement, of the right, may be accounted for by the burgesses so admitted, being considered as a distinct class from
Inhabitants the rest of the inhabitants. But it is obvious from all the documents, that this distinction was more in name than in substance, because all the *burgesses* must be *inhabitants*, as shown by the document in the reign of Richard III., and the statute of Henry VIII.; and all the *inhabitants* were entitled and bound to be *burgesses* by the law of the *tourn* and the *leet*, at which they would be bound to attend, and be *sworn*; so that in truth the only distinction between a free-man's son, or free woman's husband, or apprentice, and

other inhabitants, would be this,—that the former would be entitled to be *sworn* and *admitted* as burgesses, the moment they proved the facts of their qualification; whilst an inhabitant would not be entitled to vote till he had lived a year and a day in the place. And by this view of these facts, the whole may be reconciled and explained.

Charles II.

1715.

Had these intelligible principles been constantly acted upon, no difficulties would have arisen upon this subject; but the moment the charters* and usages of corporations introduced the term and practice of “*making*” burgesses, then the intricacies and usurpations became general, and spread into all parts of the kingdom.

Thus in this particular place, *many persons had been admitted a short time before the election*, as it was said clandestinely at unusual times and places; one at a public house by the mayor, who declared “he would ‘*make*’ as many new burgesses as would serve his turn.” And those abuses had gone to such a length, that the committee resolved, “That the proceedings of the mayor and common council of this town, in making burgesses *without the consent of the commonalty*, were illegal, and contrary to the rights of the town, and that the burgesses so pretended to be made, have not thereby acquired any right of voting at any future election.”

PETERBOROUGH.

As to *Peterborough*, the committee determined, and the House agreed with them, that “*all the inhabitants paying scot and lot* had voice in the election;”† that is, were the burgesses.

1667.

Right.

* In 3 Keble, 146, in the case of *Thomas and Sorrell*, it was said that “the king cannot grant power to others, to make a denizen; which is of the same mischief, and the power to make free is the same, though they claim to be in by the king.”—See 20 Hen. VII. 28; 7 Co. 25, Calvin’s case. “Here all is done by making free.” As to the usages introduced by these and other illegal clauses and charters, it may be observed, as is said of void letters patent, in 3 Keble, 425, in *Thomas v. Walter*, that “they gave colour to the great breach there stated, the first attempts whereof were modest, but one absurdity admitted, a hundred will follow.” Vide Keble, MS.

† 9 Journ. 17.

Charles II. This determination is as general as that of Preston,—though it will be seen that it was followed by different results.

Peterborough has been mentioned as a “burgh” in Domesday.* It did not, however, return members to Parlia-
 1547. ment till the first year of Edward VI., just before which it had been made a city by Henry VIII.,—and no other charters or documents appear respecting it; nor is there any corporation; but the *steward* is the returning officer.

1701. In the last year of William III., its election came before a committee, when the right was agreed to be “in the *inhab-*
 Right. *bitants* paying scot and lot,” as in the decision of 1667.

1728. In the second of George II., the right was determined to be “in the *inhabitants* within the precincts of the minster there, being *householders* not receiving alms,† and in other the *inhabitants* within the city, paying *scot* and *lot*.”‡

This is a singular decision, regulating the right of voting for a borough, by the limits of an *ecclesiastical* establishment.

It properly requires that the voters as *burgesses* should be *householders*. The accurate description of a burgess as argued in the Peterborough case, in 3rd Douglas. But the decision goes on to add, that the right is also in “other the inhabitants paying scot and lot;” which can only be attributed to a mistaken conception of the meaning of those terms,—because there could be no other inhabitants who paid *scot* and *lot*, but *householders*. A person indeed might pay scot—in the public charges for land only, but he could not perform lot—merely for land; because, personal residence was necessary for that purpose, and then he must be a householder; for the law took no notice of *inmates*, except for the purpose of making the householder responsible for them. And if he was a householder, he must be an *inhabitant*, and also pay scot and lot, and thus the whole would be reconciled with the case of Haverfordwest.

* See before, p. 219.

† 9 Journ. 21, 162.

‡ 3 Doug. 63.

BRIDGWATER.

In the case of *Bridgewater*, we have another instance of a decision made at this time in favour of the select body being the *burgesses**—but which was subsequently annulled, by later decisions giving the right, with some additional explanations, to the “inhabitants paying scot and lot.”

Select
body.

1669.

The report of the committee in this instance, gave the right to “the majority of the corporation, consisting of a “mayor, aldermen, and 24 capital burgesses.”

Bridgewater is not mentioned as a borough in Domesday ; nor does there appear any grant to it before the time of legal memory, although there is one, in the time of King John,—and also one of incorporation in the reign of Edward IV.,—and another for the same purpose in the reign of Queen Mary.†

It returned members to Parliament from the earliest period, and they were elected by the burgesses, and once by deputation in the county court.‡

In the fourth year of William and Mary, the right of election was *agreed* to be “in the inhabitants paying scot and lot.”

1622.

Agreed.

In the ninth of George III., upwards of 70 years afterwards, the right of election for Bridgewater was considered by the House, and it was resolved, “that the inhabitants paying scot and lot had a right to vote”§—and a motion that “the mayor, and aldermen, and capital burgesses, *not being inhabitants paying scot and lot*, had a right to vote,” passed in the negative.

1769.

Right.

In five days afterwards it was decided—“that the inhabitants of the eastern and western division of the parish of “Bridgewater, had no right to vote—but that it was in the “inhabitants of that division of the parish which is commonly called the borough, paying scot and lot.”||

Right.

This closes the municipal and parliamentary history of the borough of Bridgewater, in which, in substance, the com-

* 9 Journ. 118.

† See before, pp. 411, 999 1181.

‡ All records of the borough are wanting until the year 1706.

§ 32 Journ. 301.

|| 32 Journ. 314.

Charles II. mon law right—which equally applies to both—has been proved to exist, viz., that the *inhabitants* paying *scot* and *lot*, and which in truth means the *householders*, have been the *burgesses*.

EAST GRINSTEAD.

1679. The question as to the borough of *East Grinstead* was, whether the *inhabitants* at large or the *burgage holders* alone had the right of election, as the *burgesses*.*

Inhabitants The *inhabitants*, who were the petitioners, in order to show that East Grinstead was a borough by prescription, and that all the inhabitants had a right to vote, produced a return in the first year of Queen Mary by “the bailiffs, burgesses, and all others the inhabitants, of their common assent.” Also one of the 30th of Elizabeth, and another of the 21st of James I., by “the bailiff, burgesses, and inhabitants, of their common assent jointly together;” and one of Charles I., “by the bailiff and commonalty, in the name of themselves and the rest of the burgesses and commons of the commonalty;” and they had other records to the same effect.

Besides these, they gave parol evidence of the inhabitants having voted, as well as the burgage holders, from the 18th of James I. till the restoration of Charles II. They offered also other evidence, but the counsel on all sides agreed, that “*the inhabitants at large had the right to elect.*” And the committee resolved, “that it was a borough by prescription, and that the *inhabitants* as well as the burgage holders had a right to vote.” And the House agreed with those resolutions.

Resolution.

Whether Grinstead was, in point of fact, a borough by prescription does not distinctly appear; for it is not mentioned as a borough in Domesday: nor are there any records to show its existence as a borough before the time of legal memory. It is true that it returned members as early as the beginning of the reign of Edward II. And it is not a subject of surprise that the parties on all hands

* 9 Journ. 587.

agreed in the inquiry in 1679, that the *inhabitants* at large had a right to elect: for in the 16th of Charles I. the same question between the exclusive right of the free burgage holders and the inhabitants, was before a committee, and evidence was given of the abuse so common of the right of burgage holders of *multiplying votes*, and the committee decided that "the right of election was original;" no doubt meaning, as in the Cirencester case, in Glanville, the common law right of the inhabitant householders paying scot and lot; and they seated the candidate who was elected by the inhabitants.

Charles II.

1640.

It would therefore seem impossible that this right, so reasonable—founded on the common law—and sanctioned by a former decision, could ever be afterwards defeated.

Nevertheless, it will be seen that, although a subsequent committee confirmed the right of the *inhabitants*, the House took upon themselves to differ from that decision, and at a subsequent period the exclusive right of the burgage holders was established.

These proceedings are so extraordinary, and throw such light upon the usurpation of the burgage tenure right of election, that we shall postpone the consideration of them till they occur in their chronological order.

ALDBOROUGH.

With respect to *Aldborough*, in Yorkshire, the committee decided, "that all the inhabitants paying scot and lot had "only the right of election; to which the House assented."* They must therefore be considered as the *burgesses*: particularly as this decision was confirmed in 1690, with an express *negative* of the right of the *select number* of burgesses holding by burgage tenure.

1679.

Right.

1690.

Aldborough is not mentioned in Domesday, nor are there any documents to show that it was a borough by prescription.

It did not return members till the 30th of Elizabeth.

1588.

A peculiarity with respect to this place is, that as early as 1676, the term "*burghers*" was applied to those who exercised

1676.

* 9 Journ. 622.

Charles II. the privileges of the place. And returns in the reigns of James I. and Charles I. are stated to be made by "the burgesses and borough men." The latter a term not met with in any other place. The *burgesses* were also called "*borough holders*," all of which would be consistent with the burgesses being, according to the common law, the inhabitant householders paying scot and lot.

MONMOUTH.

1684. With respect to the right of election for *Monmouth*, a question arose,* whether it was confined solely to the burgesses inhabitants of Monmouth, or whether the burgesses inhabitants of the contributory boroughs of Newport and Usk had also the right with them. The first position was negatived, and the latter affirmed, both by the committee and the House.

AGMONDESHAM—MARLOW.

1680. The right in *Agmondesham* and *Marlow* was determined
1687. to be in the *inhabitants* only who paid *scot* and *lot*.†

NEWARK.

In the progress through the Journals, the resolution with respect to *Newark* has been purposely omitted, in order that there might be an opportunity of introducing together, not only the facts which are to be found with respect to the right of election, but also the important question of its being entitled to return members to Parliament, under the charters granted to it by Charles II.

The history connected with the former question may be shortly stated.

Newark is not mentioned as a borough in Domesday, though it has been seen before that some burgesses in it are specified in the entry of Nottinghamshire.‡ No other documents exist showing it to be a borough by prescription; nor does it appear to be treated as a borough till this reign, when a charter was granted to it.

1699. In 1699, the committee determined the right of election to

* 9 Journ. 663.

† 9 Journ. 677.

‡ See before, p. 266.

be in all the inhabitants who pay, or ought to pay scot and lot;* to which the House added, before "the inhabitants," the "mayor and aldermen."

Charles II.

Right.

In 1791, complicated statements of right having been delivered by each of the parties, the committee simply determined it to be "in the mayor, aldermen, and all the inhabitants paying scot and lot:" in whom it continued until the Reform Act.

1791.

Right..

As to the second point, the following circumstances appear from the charters, the Journals, and the debates of that time.

The charter,† is granted to the mayor and aldermen of Newark, in consequence of their petition; and it gives and confirms to them all their ancient liberties theretofore granted to them. And that in addition, the town of Newark should be a borough town, with *power to elect and send two burgesses to serve in Parliament,‡ who should be chosen by the MAYOR AND ALDERMEN, or the major part of them.* That all freemen and inhabitants within the town of Newark should be exempted from payment of tolls, piccage, &c.; the several townships of Balderton, Coddington, and Winthorp—the castle with the scite thereof—and the mills, called Newark mills; and all the persons *residing* within the town and places aforesaid should for the future be under the government of the mayor and aldermen. That the corporation should have all goods of felons, &c. That the mayor, recorder, last year's mayor, and four senior aldermen, should be justices of the peace within the limits of the *corporation*, and might choose high constables and petit constables within their jurisdiction. That no sheriff or justice of the peace of the county should intermeddle therein. That the mayor, recorder, and justices, or any five, four, or three of them, whereof the mayor or recorder was to be one, might send felons and other malefactors, by warrant under their common seal, to the county gaol. That the corporation might purchase lands to the value of 200*l.* per annum above reprises, besides the lands they then enjoyed.

1673.

Charter.

* 1 Fraser, 314; 4 Doug. 494.

† Harl. MSS., 7017, 35.

‡ And see 3 Doug. 100.

Charles II. That they might arrest for any action not exceeding 300*l.*, and
 Return of writs. have the *return of all writs* within the limits.

And that for the better maintenance of the vicar of the parish church of Newark, they should have the perpetual advowson and rectory of Winthorp, with the appurtenances, being under value, and near adjoining, unto the mayor and aldermen and their successors for ever:—with other clauses, usual in grants of that nature, subscribed by Mr. Attorney-General, by warrant under his majesty's sign manual.

Notwithstanding this charter, the right of election has, ever since and before 1698, been exercised by the inhabitants paying scot and lot. And it was then stated to be, by the
 Inhabitants charter, in the *inhabitants* paying scot and lot, and was so resolved.

1675. The entry in the Journal,* states the petition of two persons of Newark, one of Balderton, and one of Winthorp, on behalf of themselves, and the most of the gentlemen, *freemen, freeholders* and *copyholders* of these towns, which complained of undue means and practices in obtaining the charter for sending two burgesses to Parliament. And as it related to that point, it was referred to the committee of privileges and elections, to consider it with the petition against the return.

Debate. However it was subsequently discussed by the House.† The petition of Mr. Saville was read; and counsel were called in and heard. After they withdrew the matter was debated.‡

Mr. Serjeant Croke stated, that “during the sitting of Parliament such charters had been granted; and that as many members served for boroughs by creation as by charter, which might restrain the manner of election.§ The king might create boroughs, pro bono publico—burgesses being thought a benefit to the nation—for in the multitude of counsellors there is safety.” In answer to the objection, that by the charter those who pay the wages have no voice in the election, he urged, that in all charters where the

* 9 Jour. 334.

† 9 Jour. 403.

‡ 4 Grey's Debates, 297.

§ This was directly contrary to the decisions in *Glanville*.

election is restrained to the mayor and common council, it Charles II. is the same, as in the case of Dungannon.* He also said a charter was a flower of the crown, and the king's undoubted right. And if the election was restrained by prescription, *time out of mind*, to the mayor and council, it supposes such a grant. He again urged the increase of members by the *new boroughs*, and the *revival of old*, and he moved for a committee to inquire into the king's right to grant them charters.

Sir Thomas Meres said, that in this question all England was concerned; and he asked, whether the king could do this during the sitting of Parliament. Had it ever been done? no one could show such a precedent.† Better to do it by act of Parliament, as in the cases of *Chester* and *Liverpool*. Chester, Liverpool.

Mr. Powle referred to the great inconveniences which 1609. might follow—suppose the king had a mind to alter the religion. Boroughs sending 50 papists might be predominant. He said there were many precedents; and that it was a rule that the king could not impose a charge upon a borough: and whether it was a charge or a franchise he said the king could not grant it. But he urged that it was a charge, because they would have to pay the wages as a burden on themselves, whereas otherwise *they should only bear a proportion with the county*. All boroughs were County. anciently bound to come to Parliament, which shows it was a service. And he quoted the case of Torrington,‡ and of Weobly—Milborne Port—Pomfret—Plymouth, and Maidstone, as well as the boroughs which were questioned in the beginning of the reign of Queen Elizabeth, and the resolution in the 18th of James I. And he took the distinction of their being by revivor, and not by new creation; and that this was the only one created. He said the practice was, that the constitution of the House was never altered but by act of Parliament. The election is confined to a few, and all are to bear the charges of the burgesses. *Qui sentit commodum sentire debet et onus.*

* See before, p. 1609.

† The reader has seen before that there were many.

‡ Prynn, 1181.

Charles II.

Mr. Waller cited the charter of *Bewdley* in James the First's time; and the universities—the townsmen having had burgesses before, but the scholars only by grant. This questions the seats of all. Some towns of great credit grew poor, and were dismissed their attendance. He said it was no objection that Parliament was sitting, for that Parliament had sat 16 years, and the king's prerogative could not be suspended for so long a period. The number of members is a great help to the House; charters had been granted sometimes to the select bodies, and sometimes to the many, and the House has given judgment accordingly.

Serjeant Maynard contended the king might incorporate; and also limit the privilege,* or grant it at large as he pleases, with the consent of the place incorporated. The burghs

County. paid tenths—the counties *fifteenths*.

Cotting-
ton, Blad-
derton,
Winthorp.

Mr. Sacheverill.—"The towns of Cottington, Bladder-
ton and Winthorp, are drawn into wages for burgess-ship;
"and but part of the corporation have benefit of the charter;
"and all are subject to the jurisdiction of the corporation,
"and corporators summoned to the corporation court,—thus
"it creates new services. And in the grants of markets,
"&c., they have a clause, nisi sit ad aliquod damnum."

Mr. Secretary Williamson.—"To dispute the king's
"power of granting charters, with a clause of sending bur-
"gesses, would shake many boroughs in England. *Bewdley*
"was so created a borough during the sitting of Parliament.
"There is no precedent against it in the common or statute
"law; an independent clause in a grant may be repealed,
"and the patent yet stand good."

Sir John Trevor made a few observations; and *Sir Nich. Carew* said, he was glad to find that the best strength of the charter was, the vote of the House, though it was against several laws.

The question was then put, whether by virtue of the charter, Newark had a right to send burgesses to Parliament? And it was resolved in *the affirmative*.

After which, the question was put, that "the members

* Contrary to the decisions in *Glanville*.

were duly returned?" which passed in *the negative*. And a Charles II. new writ was ordered.

The argument by Serjeant Croke, that the grant was during the sitting of Parliament, seems undoubtedly to put the charter on more objectionable grounds than as if it had been during vacation; because all constitutional principles are to be considered with reference to the dangers they are intended to obviate or remedy. And it is clear, that, if the crown exercised this power to any considerable extent during the sitting of Parliament, it might have the immediate effect of controlling the decision of the House of Commons; but if made during the vacation, that effect would be too remote to be made a just ground of complaint. The learned speaker stated, that the king's charter might restrain the manner of election; but it will be remembered that the decision in *Glanville*, in the *Chippenham* case, is directly to the contrary. He correctly argues, that the king might create boroughs *pro bono publico*;—which is the true principle upon which the point should be decided; and the sending burgesses to Parliament, is only one of the many consequences of the places being made boroughs.

The argument with respect to the liability for the wages of the members shows, that at that time the wages were received; and also establishes the connexion which was understood to exist between the liability to that charge, and the right of voting for the members. And we have seen, that *notwithstanding the charter to the contrary, the right of election was exercised according to that principle.* Charter.

In the course of the debate some of the points are of importance, both with respect to the municipal rights and obligations of a borough; as well as with respect to the parliamentary privilege. Thus the distinction between the *borough* and the *county*, which we have before stated, is distinctly insisted upon; as well as the increased charge upon the smaller district of a borough, when compared with a smaller proportion of charge spread over the whole county.

Mr. Powle also distinctly states, as the fact no doubt was, that all boroughs were anciently bound to come to Par-

Charles II. liament. He likewise argued, upon the distinction which is obvious between the instances of the revival of boroughs and those of new creation. The case of the Universities could hardly assist Mr. Waller's argument, because from the fact, as well as his mode of stating it, they clearly were excepted instances. Nor do the exemptions of some places, upon account of their poverty, appear materially to affect the question.

Mr. Serjeant Maynard also remarked the essential difference between boroughs and counties—the one paying tenths; the other fifteenths.

Mr. Secretary Williamson appears to have entertained the opinion, that disputing the king's power of granting charters, with clauses for the returning of burgesses, would affect many more boroughs in England than it really would: for if the charters containing such clauses are examined, with reference to the boroughs which before returned members to Parliament—to those which were restored—and those which were created—the latter would be found very small in number. However, the important facts connected with this grant are, that the king made Newark a borough; and gave the election of members to Parliament to the *mayor and aldermen*.*

The House of Commons determined that the members returned from that place had a right to sit in Parliament, and therefore they constitutionally determined, as we have contended before, that *the king, as the head of the executive government, had the undoubted prerogative of declaring within what districts the law should be administered; and therefore had the power of creating boroughs, upon which creation would follow all the legal consequences.*†

But they properly *negatived the right of the crown to say who should be the voters for members to Parliament; and therefore they disregarded the clause of the charter which*

* The precedent of creating a borough by the charter of the crown, and giving it the right of voting has, however, never since been followed—the instances of new grants only being where corporations had become dissolved by some accidental circumstances, and the crown interposed to restore them. See INTRODUCTION.

† See post. Geo. II., Geo. III., and Geo. IV.

gave the right of election to the mayor and aldermen ; and Charles II.
fixed it, by the decisions to which we have before referred—
consistently with the common law—in the “ *inhabitants pay-
ing scot and lot.*”

This instance therefore of Newark, which has been in some degree misunderstood, properly considered, supports the two fundamental principles of the constitution before insisted upon. And therefore Whitelocke and other authors, who have written on this subject, should be read with caution, and tried by the authority of this case, and the principles illustrated by it.*

White-
locke.

There is no doubt but the want of circumspection with which such text authors have been written and read, has led to much confusion, which the consideration of the cases themselves will tend to dispel.

However, Whitelocke, whose work was published in this reign, after the Restoration, contains some sound constitutional principles, and none more so than that in which he contends, “ that the same power and authority, both in nature and extent, was given to the members for boroughs as to the knights of the shires.”† And that *their elections originally stood upon the same footing*, is one of the most important facts to be constantly kept in mind, for the purpose of avoiding the confusion of ideas which is too commonly entertained upon these subjects. Counties.
Boroughs.

It is a curious circumstance, that Whitelocke should have elaborately traced the history of the *sheriff's tourn*, and have also mentioned the *court leet*—and although he had asserted the general identity of the power and authority of the members for counties and boroughs, that he should not have considered the identity of the sheriff's tourn and the court leet ; and from thence have been led to the obvious explanation which that fact affords of the identity of the origin of both these rights, and the explanation which that identity gives of many of the circumstances connected with both these species of election. Tourn.
Leet.

Whitelocke alleges with truth, “ that the *leets* were before Leets.

* 1 Whitl. 501.

† Whitl. p. 95.

Charles II. the Conquest, and that they retained the name of "*the view of frankpledge to this day.*" But as he had before disregarded the real distinction between the *county court* and the *sheriff's tourn*, so he seems also to have overlooked the material distinction between the *court leet* and the *court baron*. An omission which produced many of the abuses before described, particularly those of burgage tenure: and the abuses were, no doubt, to be attributed to the views he and others entertained upon these subjects.

He however truly states, that there are many statutes and other authorities to show, that the court leet ought to continue to this day; which renders it still more striking that he should have overlooked the connexion between it and the right of burgess-ship, which involved that of returning members to Parliament, particularly as he also mentions the "*burgh-motes,*" and "*ward-motes.*"

He also makes this observation, speaking of their local courts:—"Surely that old way of *justice at home*, and the "exact division of it, caused great ease and safety to the "people; and though there be difference at this day in "these courts, from what they were anciently, *yet they may, "without so gross an error as some would reckon it, be yet "styled the same.*"

And he further adds—"that the *court leets* and court "barons *were still in being in the country, and retaining the "same name and nature they had before the Conquest.*"

LONDON.

Considering the circumstances under which Charles II. had been restored to the throne, and the difficulties he encountered with the Parliament during the progress of his reign—the granting the charter of *Newark*, with a clause restraining the election to the mayor and aldermen—was in itself a bold exercise of the prerogative. But the House of Commons corrected the most objectionable part of that proceeding, by giving the right of election to the proper parties.

The close of this reign exhibited events of a bolder—more dangerous—and more oppressive description.

The Parliament had driven the king to extremities—the Duke of Monmouth had been removed from his offices—and the proposed exclusion bill threatened the interruption of the succession of the crown. Charles II.

Although there had been a dissolution, the greater part of the members returned were in the preceding Parliament, particularly those for *London*. The speaker was re-chosen—and the temper of the House seemed to continue the same as it was before the dissolution. The impeachment of some of the officers of the crown was again discussed, and disputes arose between the House of Lords and Commons—the exclusion bill leading to the dissolution of this Parliament—the last which Charles II. held.

At the close of the *commonwealth*, *London* still continued to *interfere* in the *affairs of the state*, with that preponderating influence which it had always before assumed. 1650.

The apprentices demanded a free Parliament—and the city discovered symptoms of the greatest discontent. It even established a kind of separate government, and assumed the supreme authority within itself.* Appren-
tices.

They dispatched four of their principal citizens as deputies, to Monk, as he was approaching *London*, to congratulate him upon his successes: and they also sent other deputies to the king at Breda.†

After the Restoration, *London*, also still possessed great influence, and throughout the whole of this eventful period, it appears to have been resorted to in all times of difficulty; and the citizens required and received attention from the whole kingdom.

Stimulated by the country party, they unexpectedly resisted the course for the nomination of the sheriffs, and supported candidates of their own, for whom there was a majority of voices.

The court candidate was, however, declared to be elected. But being disinclined to serve, he paid his fine, and another election ensued; after which, the two court candidates were sworn into office. The next sheriff was fined a large sum

* 7 Hume, 312—315.

† 1 Siderfin, 317, 318.

Charles II. for speaking strongly against the Duke of York. And the king being dissatisfied with the city, the violent attempt was made of seizing its liberties, for which purpose, a quo warranto was issued against the corporation, calling upon them to show by what authority they exercised that privilege.

Quo
warranto.

1681. The information was filed by the attorney-general, in Michaelmas Term of 1681, and it stated that,

The mayor, commonalty, and citizens, had used and claimed without any warrant, the following franchises—

1. To be a body corporate and politic by the name of the “mayor, commonalty, and citizens, of the city of London.

2. To have the authority of electing from themselves, two persons, one of whom was to have the power of executing all writs, &c., within the city and county of the same—the other to execute all writs, &c., within the county of Middlesex.

3. And that the mayor and aldermen should be justices of the peace, to hold sessions, and pleas of the crown, within the city, and to hear and determine the same by their own authority.

Pleas. The mayor, commonalty, and citizens, in their plea to the first count, traversed their usurping upon the king, and stated, that “from time immemorial London was an ancient city,” and that the *citizens were immemorially a body corporate and politic, &c.*, by the name of “mayor and commonalty, and citizens of the city of London,” and by that name had pleaded and been impleaded, &c.

That in the Parliaments of the ninth of Henry III.—first of Edward III.—and the seventh of Richard II.—all their ancient liberties and customs were confirmed to them.

That in the 23rd of Henry VI.—2nd of Edward IV.—20th of Henry VII.—6th of James I.—14th of Charles I., and the 15th of Charles II.—they had likewise received confirmations from these sovereigns.

To the second count they pleaded the same immemorial corporation: as well by the name of “mayor and commonalty and citizens,”—as by the name of “citizens of London.” And Charter of John. that King John, in the first year of his reign, granted to the citizens that they should have the election of sheriffs of Lon-

don and Middlesex for ever. And they concluded by pleading Charles II.
1681.
the same antecedent statutes and charters.

To the third count they pleaded, that the city was an *ancient* city and county, and the *citizens immemorially a body corporate and politic*; and that Charles I., in the 14th year of his reign, granted that the mayor and recorder, the aldermen who had been mayors, and the three senior aldermen who had not executed the office of mayor, should be justices of the peace, &c. Quo warranto.
Pleadings.
Charter of Charles I.

The attorney-general first takes issue—"that the mayor, *commonalty, and citizens, were not a body immemorially politic and corporate.*" Replication.
Issue.

And then protesting that they were not an immemorial body corporate, he alleged that in the 26th of Charles II. the mayor, commonalty and citizens, had assumed, by bye-laws, an unlawful authority to levy money for their own use upon his majesty's subjects and liege people, as well free, as not freemen of the city, and other foreigners bringing provisions to market, by which, for seven years then last past, they had received 5000*l.* per annum.

That in the 32nd of Charles II., the common council had seditiously assembled, and without any legal authority assumed to themselves to censure and judge the king as to the prorogation of Parliament—and did then ordain a petition should be exhibited to his majesty upon the subject: to the intent that it might be dispersed abroad, that the prorogation of Parliament was an obstruction of justice—to incite hatred towards the person of the king and his government—and to disturb the tranquillity of the kingdom.

And as well as to the plea, claiming the election of sheriffs, and also as to that which alleged, that the mayor and aldermen should be the justices, the attorney-general imparled.

The mayor, &c., rejoin that the pleas were not sufficient Rejoinder.
in law, and protesting that no act done by the common council is the act of the body corporate; and that they never assumed to themselves any unlawful power to levy money on the subject to the private lucre of the mayor and

Charles II.

1681.

Quo
warranto.

Rejoinder.

commonalty; and protesting that they had not levied so much as the attorney-general alleged: For plea, nevertheless say, that the city of London, from time immemorial, was the chief and capital city and metropolis of the kingdom, &c.; that there had been immemorially a market held there; and that they had been immemorially seised in fee of the market; and for supporting the same had been accustomed to provide market places, appoint officers, cleanse the market, and to have reasonable tolls: and that the citizens and freemen of London amounted to 50,000, and more.

That there had been a custom from time immemorial for a common council, consisting of the mayor, aldermen, and citizens being freemen of the city, not exceeding 250, annually elected, called the "Commons* of the city," to make bye-laws for the regulation of the public markets, &c.: and that to defray the incidental charges thereof, they had demanded and received certain reasonable rates or dues from those trafficking in the market.

That an execrable plot had been formed by the papists to murder the king, subvert the ancient constitution of the kingdom, and to abolish the protestant religion. That several persons had been executed for the same, and several noblemen† were then imprisoned in the Tower for those offences. That the king, in his speech to Parliament, had recommended the examination of the conspiracy; that a solemn fast had been kept, in obedience to the king's proclamation; and bills prepared for the preservation of the Protestants.

That whilst the impeachments and bills were pending, the Parliament had been dissolved, and the citizens and *inhabitants* of the city being disquieted for the preservation of the king and his government, caused to be written the petition in the replication, and presented it to the king: but they traverse that it was done with any other object.

Sur-
rejoinder.

The attorney-general, in his sur-rejoinder, as to the making

* The "Commons," properly speaking, according to a variety of documents which have been quoted, must mean the general body of the *commonalty*.

† Lords Powis, Arundel, Petre, and Bellasis.

and publishing the bye-law for levying the tolls in the market—protesting that the mayor, &c., were not seised in fee of the markets, nor at their costs provided stalls, &c.; and protesting that the rates, &c., were not reasonable: for plea, nevertheless, alleged that, by the statute of the 22nd of Charles II., it was enacted that commodious places should be set out for the markets, that the principal streets might not be obstructed; and that the Royal Exchange, Guildhall, Sessions House, Old Bailey, common gaols and prisons, might be enlarged and secured against the casualty of fire; and that some convenient distance, interval, and circuit of ground might be left between the Royal Exchange and other houses to be built within the city; and that the mayor, &c., might employ those places for the public market and the ornament and enlargement of the Exchange, &c.; and that they should have certain duties on coals; all of which monies were to be issued and paid according to the directions of that statute;—one-fourth to pay the satisfaction for the ground set out for enlarging the streets:—and one moiety for such purposes as in the act is specified. And that the mayor, &c., had received the duty for coals, and, without any authority, had in their common council made a law by themselves for levying certain sums from persons coming to the markets, and had, under the colour and pretence of that law so made by themselves, levied large sums upon the king's subjects coming to the markets, and disposed of such monies to their own use, in subversion of the good rule and government of the city, to the oppression and impoverishment of the subject, and disinherison of the king, and against the trust in them reposed as in a body politic. And he traversed that the mayor, &c., had been immemorially accustomed to receive tolls.

Charles II.
1681.
Quo
warranto.
—
Sur-
rejoinder.

And as to the rejoinder to the part of the replication, protesting that the prorogation of Parliament was for the good of the kingdom, he demurred.

And the mayor, &c., as to the last sur-rejoinder, joined in demurrer.

And as the sur-rejoinder of the attorney-general to the

Charles II. making and publishing the law for levying the tolls in the
1681. market, they say, that the mayor and commonalty and citi-
Quo zens, from time immemorial, have been accustomed to have
warranto. reasonable tolls of all persons coming to the market to sell
Sar- their goods there, for their stalls and accommodation, and
rejoinder. for this they put themselves upon the country, &c.

And after certain imparlances, there is a joinder in demur-
 rer by the mayor and commonalty.

The attorney-general enters a nolle prosequi as to the
 election of sheriffs, the return of writs, and the execution of
 the office of sheriff.

As to the matters in law a day is given.

Judgment was afterwards delivered that the liberties, pri-
 vileges, and franchises of being a body corporate, &c.
 should be taken and seised into the king's hands, and the
 mayor, &c., should be fined for their usurpation.

This case was first elaborately argued by Mr. Finch, the
 king's solicitor-general, for the king, and Sir George Treby,
 the recorder of London, for the city.

**Solicitor
 General.**

Mr. Finch argued the case under the four heads :

1. Whether any corporation can be forfeited.
2. Whether the city of London differs from other corpora-
 tions in that respect.
3. Whether any act of the mayor, aldermen, and common
 council, in common council assembled, be so much the act
 of the corporation, as to make a forfeiture.
4. Whether the acts by them done in making the bye-law
 and receiving money by it, or in making the petition, and
 causing it to be printed and published, be such acts as if
 done by the corporation, will make a forfeiture of the
 corporation.

It should be recollected that the first important question
 which arose in this cause was, whether London was, from
 time immemorial, a corporation; upon which issue was
 joined, but not tried. That point, was antecedent to those
 urged in this argument; and if decided against the citi-
 zens, would have made the discussion of the others unne-
 cessary.

We shall not for the present canvass that point, but postpone it till the close of this case.

The first matter pressed by the solicitor-general was, "That a corporation could be forfeited," upon which his reasoning in point of law, was absolutely conclusive.*

Charles II.
1681.
Que
warrants.
—
Solicitor
General.

The second, "That the city of London did not, in essential qualities, differ from other cities," was also conclusive: and is supported by the numerous documents respecting the one and the other, which have been quoted in the course of this work.

The third point, as to the liability of a corporation, for the acts of the common council, depended entirely upon one fact, whether they *represented the body at large*; if they did, of which there could be no doubt, the corporation were clearly bound by them.

The fourth, which was the substantial point in the case, (always assuming that London was a corporation,) was whether the offences set forth in the replication, were forfeitures; the first of which was the making a bye-law for the levying of money under the name of tolls.

It was a clear ground of seizure, if, being intrusted with the jurisdiction, they took to themselves the power of levying money upon the subject:—but to say that merely demanding tolls, whether lawfully or not, was a ground of forfeiture, is certainly straining the law beyond its proper bounds.

The solicitor-general argued at great length the point upon the right of the corporation to take the tolls: but which, for the reason given above, was not the real question. The second point, as to the making the bye-laws, seems to be as clearly with him, as the other was doubtful. He properly described it as usurping a power which they could not have, and that it was a breach of trust and misuser of their franchise, to the oppression of the king's subjects, and that they had taken upon them a legislative power to oppress their fellow-subjects.

* See instances of forfeitures and seizures before, pp. 562, 563, 587—614. Mirror admitted, pp. 630, 655, 656, 683, 887, 1019, 1076, 1229, 1441, 1661, 1703.

Charles II.

1681.
Quo
warranto.
—
Solicitor
General.

The last point was as to the petition, which the counsel appears to have placed upon its proper ground—not as consisting in the presenting, but in the printing and dispersing it. A distinction well known to the law; and it would be a strong proposition to say, that the enfranchised grantees of an exclusive jurisdiction from the crown, should not be liable to have that franchise seized, when they published a paper charging the king with interrupting the public justice of the kingdom; otherwise the grantees of the executive power in the state could call in question the exercise of the executive power by their grantor. A manifest anomaly in municipal policy.

Sir George
Treby.

Sir George Treby, who had succeeded Jefferies, afterwards the chief justice, argued the case on behalf of the city. And adopted the same division of the subject, excepting that he mentioned incidentally the question of London being a corporation by a prescription.

The
Recorder.

As to the first point, urged by the solicitor-general, that a corporation could be forfeited, the answer of the recorder does not appear to be satisfactory; and turns upon technical reasoning, to which the reader must be referred, as it would be useless to introduce it in this place, the law upon this head being, now at least, perfectly clear.

Neither can the authority of Lord Coke, with respect to the case of Old Sarum, in order to show, that, though a town should decay, the borough would continue, be much relied upon; as it is in fact only quoting the abuse of the law against the law itself.

Neither would it be possible at this day to dispute the doctrine, that a corporation might be *surrendered*, which the recorder denied. The doctrine, in the case of *Norwich*, which he quotes, “that though a king can grant a corporation, he cannot dissolve it,”* does not help his argument; for that must be taken to mean, without cause, which is undoubtedly true; and it is equally clear, that for cause the king in his courts of law may dissolve a corporation.

* See also subsequent case of *Rex et Reg. v. Larwood*, 6 W. & M. 1 Raym. Rep. 29.

And as to surrender, it operates by consent of the grantee accepted by the grantor. Chapter II.
1681.

The recorder next argued the point as to the market, and contended for a pre-eminent regard to the privileges of London beyond that given to other places; for which there seems no solid ground, excepting in degree, with reference to the importance of the place. He relied upon providing the market places, as one of the reasons for the toll. Que
warrants.
—
The
Recorder.

He properly urged, that an unreasonable bye-law was no ground for forfeiting a corporation, which is true; but if they assumed to themselves to make a law imposing a tax upon the subject, it is an obvious ground for forfeiture. That could never be put on the ground of a mistake in law, or a mistake in fact, as the recorder contended it to be. And the argument, that it was only a forfeiture of the market, turns upon the same point; for that assumes, that the money was levied with reference to the market, and not as a general imposition. If it was the former, no doubt it was not a cause of forfeiture; but if the latter, it would seem as clearly the reverse.

The recorder argued correctly that it was justifiable to petition the king: and in that respect his positions are unanswerable, both in argument and principle. But—as is said in the dictum from Lord Hobart, which he quoted—"much must depend upon the manner in which it was done." With respect to the matter of the petition, the recorder does not appear to be so successful in his argument. And the excuses for printing and publishing it are still less satisfactory.

The remaining point which he insisted upon was, that the act was done by the common council, and not by the corporation at large: but it is obvious, that unless they had been appointed by the corporation, they could have had no existence at all; and therefore this argument was founded merely upon a play upon the words.

The recorder concluded by truly asserting, that *all innovations were dangerous*; and expressed his hope that the frame of government in this country, which had lasted and been preserved for so many hundred years, might still endure.

Charles II.

H.T.1681.

Que
warranto.Sir Robert
Sawyer.

This case was again argued in the next term by Sir Robert Sawyer, the attorney-general for the king, who, as to the forfeiture for the misconduct of the corporation, put it upon the plain ground of the danger either to the king or any of his subjects who lived near a corporation, if they were not responsible in punishment for their conduct.

The attorney-general took the same line of argument as had been before adopted by the solicitor-general, and illustrated his positions by a variety of cases which it would be tedious and needless here to quote.

But it is necessary to remark, that his argument goes to show that *the privileges granted to cities and boroughs were for their good rule and government, and founded upon the separate jurisdiction of the boroughs from the county at large*, in speaking of which he expressly refers to the *inhabitants* and their *houses*, for the government and peace of whom they are created, and intrusted by the king upon the public account, and not for any private respect or profit whatever.

As to the question respecting the common council, the attorney-general placed it upon the sound ground of their being a body *delegated* and intrusted by the body at large, either expressly in plain words or by implication of law, and their acts were of the same obligation as if they all assembled.

And as to the levying of money, the argument of the attorney-general seems irresistible; when he treats it as being a power superior to any the king has, by laying burdens upon the people and levying money. And his reasoning was still more conclusive, not with respect to the fact of the petition, but to the matter, form, and nature of it, which he wound up effectually in this one sentence—"But when the matter is false, and the libel published against the king, to withdraw his people's affections from him, and that by a joint council of a corporation, there can little room for question remain, but they have broken their original trust for good government, and misused their liberty to licentiousness."

It is impossible on the one hand not to admire the learning, spirit, and talent with which the case was argued ;

or on the other, to avoid censuring the bad taste and feeling with which the argument was closed.

The case was spoken to on the other side, for the city, by Mr. Pollexfen, who denied that there had ever been a precedent for the forfeiture of a corporation; but which, considering the cases cited on the other side, was a strong assertion. He then proceeded upon artificial reasoning, to show that corporations could not usurp, according to the definitions which had been before given of them and of usurpations, by Lord Coke and others. And that the proceeding ought not to have been against the body at large, but against the particular persons.

Charles II.
1681.
Quo
warranto.
—
Mr.
Pollexfen.

He also argued as to the defects of the pleading in point of form, and the manner and effect of the judgment.

And as to the bye-law for the toll in the market, he quoted many instances to show that the common council had the power of making bye-laws; and as to the levying money on the king, he contended, that at most, it was but extortion, but not a ground of forfeiture.

With respect to the petition, he contended that the facts contained in it, and admitted by the demurrer, were true; and he repeated the argument that the corporation were not liable for the act of the common council. And he further argued, that even if all the other points were against him, the petition was not such an offence, as that the corporation should be forfeited for it. And in summing up his argument, he contended that the information should have been brought against the particular persons—that it was repugnant and contradictory, that a corporation could usurp to be a corporation—that a body politic or being could usurp to be a body politic or being before it had a being,—or to be that same body politic or being which it was when it did usurp—that if forfeiting a franchise could not determine it till the forfeiture appeared on record, then the old corporation supposed to be forfeited did continue in being till there was a record; and consequently, that one which is pretended to be a new one by usurpation, is impossible.

That if by seizure into the king's hands the continuance of

Charles II. the corporation is intended, it is inconsistent with law and
 1681. justice to continue in the king any thing that is wrongfully
 Quo usurped. And he objected to the form of the pleadings, and
 warranto. contended, that seizures and forfeitures were different ; and
 — Mr. that the forfeiture by misusing or abusing a franchise was
 Pollexfen. not applicable to a capacity or being.

That the common council were merely *delegates, deputies,* or *ministers* of the corporation, and should answer for what they have done amiss in their own persons. That good right had been shown to make bye-laws for the markets and tolls ; and that if any one of those points were with him, he ought to have judgment.

Judgment. In the next term, judgment was given in this case.

Pemberton had been chief justice till the time when it began.* Upon its commencement he was removed, and Chief Justice Saunders, placed in his stead died the day the judgment was given, or the next day after ; and Mr. Justice Jones, having present with him Mr. Justice Raymond, and Mr. Justice Withers, who concurred with him, delivered the judgment of the court, affirming, that the chief justice was of the same opinion with them, and that they all agreed,

1st. That a corporation aggregate might be *seized*, and that the statute 28th of Edward III. c. 10, expressly states it ; and that bodies politic might offend and be pardoned ; for which the articles of pardon, in the 12th of Charles II., and the statute for regulating corporations in the 13th year of the same reign were cited.

2nd. That the exacting and taking money, by the pretended bye-law, was extortion, and a forfeiture of the franchise of being a corporation.

3rd. That the petition was scandalous and libellous : and the making and publishing it a forfeiture.

4th. That the act of the common council was the act of the corporation.

5th. That the matter set forth in the record did not excuse or avoid the forfeitures.

6th. That the information was well founded, and therefore

* See Life of Lord Keeper Guildford, vol. ii. p. 40, and the notes there.

judgment was given, that the franchise should be seized into the king's hands : but the entry of it was respited until the king's pleasure should be known.

Charles II.

1681.

Quo
warranto.

Judgment.

And the attorney-general as to the issue to be tried by the country : and the claiming to have sheriffs : And that the mayor and aldermen should be justices, and hold sessions : Ordered, " that a noli prosequi should be entered."

As to the rest, the court took time to advise till Trinity Term, when the judgment was entered, that the mayor, and commonalty, and citizens, had forfeited their franchise to the king—that their plea was bad, and therefore it was considered that the liberty, privilege, and franchise of being a body politic and corporate, and pleading and being impleaded by their corporation name, should be taken and seised into the king's hands.

This case, probably in a judicial as well as a political point of view, the most important that ever occurred in the courts of law, both in its origin and result, has been much misrepresented on the one side and the other. It is impossible to form a correct opinion upon the subject, without considering the historical facts which preceded and accompanied it.

Whether called for by the king's conduct or not, which may be a disputable question, the House of Commons had undoubtedly thrown great difficulties in the way of the king and his government.

The city of London had taken a prominent part in increasing those difficulties. Political animosities, aided by incessant and violent disputes upon religion, had arisen* to the greatest possible height ; and there can be no doubt but that the election of the sheriffs in London, in the unusual course to which we have before referred, whether it was legal or not, had been founded upon party political feelings.

It seems however clear, that the interference of the court on that occasion, was both violent and arbitrary ; and in a manner not justified by the law.

* The thanks of the House were given at this time to the city of London, for the part it took in these transactions.

Charles II.

1681
Quo
warranto.

As far therefore as the quo warranto was in any degree to be attributed to those proceedings, as some writers have considered, it was unwarrantable; but upon the other hand it must be remembered, that the House of Commons, inordinately alarmed upon the subject of papacy, had its suspicions and fears roused to such an extent, as to be led into acts altogether unjustifiable, and upon the suspicions it entertained, was attempting to interrupt the succession of the crown, and introduced a bill into Parliament for that purpose. It was the bounden duty of the king, by his oath and honour, to maintain that succession unimpaired. Had the bill passed both Houses of Parliament he must, as a man, have given it his negative. It was better for him personally—and for the nation generally—that he should avoid that dilemma, and dissolve the Parliament.

However, be that point as it may, it was his indisputable right and prerogative to do so if he thought fit.

On the other hand, it was the clear right of any of his majesty's subjects—the city of London or others—to address the king in a becoming manner, upon that or any other point connected with their interest.

But for any individual—and still more for a corporate body—exercising municipal and judicial government under the authority of the king—to address his majesty, and state, that by the exercise of his rightful prerogative, the prosecution of the public justice of the kingdom—and the making provision necessary for the preservation of the king and his subjects had been interrupted—was a libel on the king; and, as such, ought not to have been made under the pretence of a petition to his majesty. And even if, it might be excused, as inconsiderately, or hastily made; yet its being printed and generally published was, under any circumstances, sufficiently unjustifiable to warrant the filing of the information of quo warranto.

The making of the bye-law for collecting tolls from the market was, also, probably a just legal ground of interposition. But still it is evident, that it was rather sought for as a reason for supporting the quo warranto, than the real

cause of its being filed. And so far this latter complaint must be attributed to the feeling prevalent at that time in the court against the city; and it undoubtedly throws upon the proceeding a doubt and suspicion which would not have arisen had the measure been confined to its real occasion.

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Quo
warranto.

Such would be the considerations with reference to filing the information.

As to the progress of the cause, it cannot but be admitted on both hands, that the case was most ably and most learnedly argued on both sides,* and apparently with equal indifference to each party, and under no restraint or embarrassment.

As to the judgment also, undoubtedly, the removal of the Lord Chief Justice, and substituting another Judge, is open to the suspicion which will always attend changes of that description, without any honest assignable cause for them.

But it is an unjustifiable weakness to allow such a suspicion to warp the mind from considering the real merits of the case.

Upon some points there can be no doubt, that the judgment given by the court could be supported.

That a corporation may be forfeited there can be no question.†

The exaction of the tolls, though perhaps supportable as a ground of forfeiture, is a disputable point.

That the petition was scandalous and libellous there can be no doubt; and if the legality of its being made were questionable, there can be no hesitation in saying that the publishing of it, was in a corporation a high crime and misdemeanour: which, if any thing could justify the recalling

* As preparations to the arguments a most elaborate collection was made from the city records, by the celebrated antiquarian, Mr. Petyt, whose MSS. have been quoted from the Inner Temple Library:—and the records to which he refers, fully confirm all we have before stated, with respect to the citizens—their constituency—and inhabitancy—continual residence—and paying scot and lot: as well as the distinction between the citizens and foreigners. See also a writing upon the same subject in Strype's Stow, 1st edit. 1755, vol. ii. Holt's Rep. 168; S. C. 1 Shaw, 263, 2 Cro. 260, 10 Rep. 33, Sutton's case.

† Rex et Reg. v. Larwood, 1 Raym. Rep. 29; the King v. Amery, 2 T. R. 515. The King v. Monck, 2 Durnf. & East, 515. And see the references before, p. 1783.

IN THE CITY OF NEW YORK, THE OFFICE OF THE DISTRICT ATTORNEY, THE FOLLOWING IS THE STATE OF THE MATTER:

THE DISTRICT ATTORNEY OF THE DISTRICT OF COLUMBIA, THE FOLLOWING IS THE STATE OF THE MATTER:

THE DISTRICT ATTORNEY OF THE DISTRICT OF COLUMBIA, THE FOLLOWING IS THE STATE OF THE MATTER:

HOWEVER, THE DISTRICT ATTORNEY OF THE DISTRICT OF COLUMBIA, THE FOLLOWING IS THE STATE OF THE MATTER:

IT IS THE POLICY OF THE DISTRICT ATTORNEY OF THE DISTRICT OF COLUMBIA, THE FOLLOWING IS THE STATE OF THE MATTER:

THE DISTRICT ATTORNEY OF THE DISTRICT OF COLUMBIA, THE FOLLOWING IS THE STATE OF THE MATTER:

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appears which shows London ever to have been incorporated ; Charles II.
1681.
Quo
warranto.
yet the legislature—as almost a solitary specimen of the kind—enacted, contrary to the fact—that the mayor and commonalty and citizens might *prescribe to be a body corporate and politic*:—Probably the greatest stretch of legislative power which our statute book exhibits.

Upon the whole, therefore, a dispassionate inquirer must be led to conclude, that comparing these legislative and judicial acts with each other, the former must be held in lower estimation than the latter.

But whatever justification may be asserted for the proceedings in the London quo warranto, it is impossible to excuse, or make any apology for, the proceedings adopted with respect to the other boroughs in England: which cannot be characterised in any other manner than in the language adopted by Hume, who says—"the crown thereby gave the "greatest wound to the legal constitution of the country, "which the most powerful and arbitrary monarch had ever "been enabled to inflict."*

The course adopted after the judgment in the London quo warranto, is described by Roger North, in his life of the Lord Keeper Guildford†—"Either to court or frighten harmless "or orderly corporations to surrender—or upon refusal, to "plunge them in the chargeable and defenceless condition "of going to law against the crown—whereby that which "would not come by fair means, was extorted by violence."

One of the principal instruments in these proceedings was Judge Jefferies, who is described by the same author—"as "having originally begun in the city with a turbulent spirit, "taking part with the commons against the mayor and court "of aldermen, and so got made recorder." It is, however, probably too severe to attribute this conduct to Jefferies: for "he was a high flier for the authority of the mayor, and court "of aldermen." Jefferies afterwards gave up the office of recorder, and was succeeded by Treby; and it was after Jefferies was made a judge, that he obtained much credit

* Hume, viii. 178.

† Roger North, in his Life of Lord Keeper Guildford, p. 115.

Charles II. an authority which had been abused, would clearly warrant the forfeiture of the municipal franchise.

1681. Quo warranto. That the corporation was not to be bound by the act of the common council, was a mere subterfuge which it would have been a disgrace to the law to have allowed to be successful. In fact, law, and morals, it was the act of the corporation, and intended so to be.

The other parts of the judgment are merely the formal conclusions of law from the above premises, and upon the whole, no mind investigating this subject with the impartiality which the distance of time allows, can hesitate to give its assent to the legality of this judgment.

However, so perverse are mankind, that when a supposed injury has been committed, they are prone to run into an opposite extreme. After the still more violent reign of James II., upon the coming of the Prince of Orange, the legislature were induced to pass an act declaring that the judgment delivered by the three judges, in a court of competent jurisdiction,* after a full hearing of the case, was illegal and arbitrary.

It is perhaps a strong position to state, that this act of the legislature is difficult to be supported, either on the ground of law or justice; but a consideration of the statute will appear to warrant such an assertion.

If the legislature had merely restored the corporation to all its functions, it would have done all that was useful or necessary, and no complaint could have been made of the proceeding. But to go beyond that, and declare the judgment to be illegal and arbitrary, must be attributed to the diseased temper of the times. That the framers of the statute were disposed to go great lengths upon this subject, may be farther seen from this circumstance—that notwithstanding the documents and authorities which were referred to in that case, and the continued series we have quoted, as well as those published by the numerous writers on the rights and privileges of the city of London; and particularly the late publication of Mr. Norton; no document

* 2 Will. & Mary, cap. 8.

appears which shows London ever to have been incorporated ; Charles II. 1681. Quo warranto.
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* Hume, viii. 178.

† Roger North, in his Life of Lord Keeper Guildford, p. 115.

Charles II. with the king, for procuring, in the manner suggested above,
 1681. in the life of the lord keeper, the surrenders of many charters, insomuch, "that when he went the midland circuit as " lord chief justice, he is said to have made it his great " business to terrify the people into compliance with the " surrender of their charters. And at his return he waited " on his majesty at Windsor, and delivered up to him the " charters of the city of Lincoln, and of several others within " his circuit, as an oblation, it is added, of his own loyalty, " and a triumph over the people's liberties."* One of the charges against him afterwards was " his avoiding the charters."†

These proceedings, Hume justly observes, " left no national privileges in security, but enabled the king under " like pretences, and by means of like instruments, to reclaim " all the charters which he pleased."

The effect of such a course upon those who witnessed their danger, is also aptly described by him " as unfortunately embarking in faction those powers, talents, and exertions, " which, if applied in a legal and constitutional manner to " redeem the state, might have produced effects more profitable to the country and less ruinous to themselves."

Another individual, engaged in procuring the surrender of the charters, was the Earl of Bath; who returned from Cornwall only the day after the king's death, with powers of attorney to surrender the charters of 13 or 14 places in the west. And he is said to have had in his possession " no less than " 15 charters, so that some called him the ' prince elector;' " and he put into those charters for Cornwall (as we have " noted before), the names of various officers of the guards."‡

And Roger North also says, " that the trade of charters " ran to excess, and turned to an avowed practice of garbling " corporations for the purpose of carrying elections to the " Parliament."§

* 3 Kennet, 423.

† 5 Cobbett, P. H., p. 413.

‡ Evelyn's Mem. vol. i. p. 561.

§ Burnett's Hist. of his own Times, vol. iii. p. 1072.

BRISTOL.

Bristol was another of the places proceeded against; the elections of mayors, sheriffs, and other officers being alleged to be made by different numbers—49, 51, and 53, instead of the usual number of 43;* and the charge was, that they had claimed to be, of themselves, a body corporate and politic, &c., and to appoint two sheriffs and the mayor to be justices of the peace, and to choose, from themselves, a common council, consisting of certain citizens exceeding the number of 50,† with power to make bye-laws, &c.

The city, alarmed at these proceedings, executed a surrender to the king in the following form:

“To the king’s most excellent majesty.

“We, the mayor, burgesses, and *commonalty*, having for several years past negotiated all the principal affairs of this city, made all the elections of our mayor and recorder, town clerk, sheriffs, common councilmen and all other officers whatsoever amongst us, by a *supernumerary common council*, *contrary to the institutions of this city and charters*, and contrary to the usage and custom ever since that time, till of late years; and that we may have been faulty in that particular, and that there are some defects in the model of the government among us. We therefore pray and beseech your majesty to accept, and we *have granted, surrendered, and yielded up* all the *powers, franchises, liberties, privileges*, authorities, &c., heretofore granted, used, or exercised, concerning the electing of any person or persons to the offices, trusts, &c. of mayor, aldermen, sheriffs, recorder, or town clerk, by virtue of any letters patent, charters, prescriptions, &c. And we, the mayor, burgesses and commonalty pray your majesty to accept this surrender, and implore your favour to confirm our charter as to all other privileges, and to grant unto the citizens the said liberties and franchises, or so many of them as your majesty may think conducive to the good government of the city.”‡

* Vide post., pp. 1798, 1799.

† Ib.

‡ In this surrender, the town clerk is mentioned, but no such officer is created by any previous charter. This surrender is, in point of law, void, never having

Charles II.

Bristol.
1684.

Bristol, like London,* is *not spoken of as a corporation* in any of the charters before this time. And in a case at law in 1682,† it was objected to the mayor and sheriffs that they did not allege themselves to be a corporation. It is described in the information of quo warranto, as having *usurped the right* of being a *body corporate* and politic. The mayor, burgesses, and commonalty in their surrender, *do not*, in any respect, *refer* to their having been a *corporation*.

Incorporated.

After this surrender, the king granted a charter to Bristol, for the purpose of *incorporating* it, which commences with a recital, that for the bettering of the city of Bristol, and for the good rule and government of the people therein; and upon the petition of the late mayor, burgesses and commonalty, the king had granted that it might be for ever a city incorporated and county by itself, in as ample and large borders, &c. as the city and county had been terminated for any time *within* the space of twenty year past.

Name.

That the citizens and *inhabitants* of the city, and their successors, might be a body corporate and politic, by the name "of the mayor, burgesses and commonalty of the city of Bristol," with power to purchase lands, &c. and have perpetual succession, &c.

The mayor and two 'sheriffs are then appointed, who were to have the same authority as their predecessors theretofore had in Bristol.

That all mayors should have their oaths of office administered to them by the mayor of the city immediately preceding, if surviving and *abiding* in the city; or in his absence, by the recorder; and in his absence, by the senior alderman who at that time should be *inhabiting* and *residing within the city*.

That there might be in the city as many of the better and more discreet *burgesses* and *inhabitants*, who with the mayor

been enrolled.—*Newling v. Francis*, 3 T. Rep. 389.—But it having at a subsequent period been cancelled by the attorney-general, and returned to the mayor, it was rendered absolutely nugatory.

* *London also was not mentioned as a corporation*, till a charter granted to them in the sixth year of James I., and then only indirectly in the confirmation of the privileges "granted to them and their predecessors, by whatsoever name of incorporation."

† 2 Show. 236.

and aldermen, should not exceed the number of 43; and with them should be called the common council, to aid the mayor for the good governance of the city, &c.; and that as vacancies occurred, they should be supplied from the discreeter burgesses and *inhabitants*.

Charles II.
Bristol.
1684.

Vacancies.

Powers are then granted to the common council to make bye-laws, &c.

That no laws made by them should be binding beyond the space of one year, unless approved of by the lord chancellor.

That the common council should elect the mayor annually from themselves; and also the two sheriffs from among themselves or *not*; and might elect and nominate all other officers.

The recorder is then appointed and named; but future recorders were to be elected by the mayor and common council; and their selection confirmed by royal assent.

The recorder and eleven others are then nominated and appointed aldermen, and to be justices of the peace, with the same powers as theretofore.

That the mayor and aldermen should fill up vacancies from the common council.

That all the aldermen of the city for the time being, the recorder excepted, should be *resident* within the city or suburbs, liberties and precincts of the same.

Resident.

The charter then proceeds to grant amongst other things, that the mayor and *commonalty* shall have all *fin*es, &c.

Common-
alty.

That the mayor might hold four sessions of the peace.

That all the fines at gaol delivery should be reserved to the crown.

A town clerk, and steward of the sheriff's court are then appointed and named: and that the common council might elect the successors, who were to be barristers of three years' standing, and approved of by the king.

That the two coroners, nominated in future, should be elected by the common council, and approved of by the king.

That all the corporate officers should be renovable under the seal of the privy council.

Charles II. A grant of fairs and markets, &c., with a general confirmation of privileges, concludes this charter.

Bristol.

1684.

Inhabitants It should be observed, that this document establishes that the burgesses were the *inhabitants* of the place; by stating in the preamble that it was intended for keeping the peace of the town, and the good rule and government of the *people therein*; which clearly describes the persons intended to be affected by the charter; and there seems no sound reason for assuming that they were not the persons to whom it was granted.

Surrender. It seems to assume that the former charters had been surrendered, because it speaks of the late mayor, burgesses, and commonalty. If it was granted on the *assumption of the surrender being valid*, as in fact it turns out not to be, the charter was *void*,* inasmuch as the king was deceived, and the charter granted on the erroneous assumption of a valid surrender.†

Incorporation. This charter expressly incorporates the town, and makes the citizens *and inhabitants* the corporation; which tends to confirm the opinion before expressed, that it was not anciently a corporation;—for after so long a series of charters, it would be strange, that one should be granted, expressly particularizing all the corporate powers, and should incorporate them in a new and unusual manner, if they were before incorporated by implication or otherwise.

Inhabitants It should also be observed, that the incorporation expressly includes the *inhabitants*; confirming the former assumption, that the *inhabitants* were the persons intended to be included in the operation of the charter.

Common Council. The “common council” are first mentioned by name in this grant. Excepting indeed that in the quo warranto, the *burgesses* and *commonalty* are charged with usurping the privilege of choosing a common council; and in the surrender, the burgesses admit that they have had a supernumerary common council; so that it seems questionable whether they were entitled to have such a body before this charter; and

* In 1710, the burgesses refused to act under this charter, considering it void.

† See *Piper v. Dennis*, Holt’s Rep. 170; 12 Mod. 253; and *Butler v. Palmer*, Salk. 190; *Rex v. Osborne*, 4 East, 327; and *M’Williams’s case*, Dyer, 237 a; and the *Duke of Somerset’s case*, 3 Dyer, 355.

as it was void, it could not give them the right of electing such a body; therefore it seems that such election cannot be supported; nor any election of the kind excepting the 40 under the charter of the 47th of Edward III.

Charles II.
Bristol.
1684.

A common clerk also is for the first time appointed by this grant; although such an officer is before mentioned in the charter of the 16th Charles II.; but it does not appear by what authority he had been appointed. It seems to be assumed in this charter of the 36th Charles II., that a common clerk had existed long before in the city.

IPSWICH.

Ipswich also was another place against which similar proceedings were had in the Court of King's Bench: by which the burgesses were intimidated, and imitating the example of many other corporations, they *surrendered* all their charters, franchises, and privileges to the king, by a formal deed under their common seal. After this was obtained from them, his majesty incorporated them anew, by granting the following charter, which commences with a recital, "that for the advancement of the town, and hoping that the burgesses, and *inhabitants*, by enjoying more ample liberties, " would feel themselves more bound to perform their services," *granted* that the town or borough of *Ipswich*, might for ever be a town or borough *incorporated*, and that the *burgesses* and *commonalty* might for ever be one body corporate and politic, and that by the name of "the bailiffs, burgesses, and commonalty," might have perpetual succession, &c.—the usual corporate powers are then granted, and provisions respecting the election of the municipal officers.

Surrender.

Incorporate.

The charter concludes with a clause, that "*all the officers of the borough* should be *removable by order of the king in privy council.*"

It also provides that the common council might admit any persons *inhabiting or not inhabiting* within the town or borough, to be *freemen* for their lives, of the borough, if not by the common council removed; but that no person should be admitted, who did not conform to the church of England; receive the holy eucharist within the space of six months

Common Council.

Freemen.

Charles II. before; and take the oaths of allegiance and supremacy,
 1684. before the bailiffs of the town.

CHESTER.

Chester also was in the same predicament. A warrant of attorney to appear, was produced under the mayor's seal, and was afterwards followed by a surrender.*

ROMNEY, &c.

Romney, and many other places too numerous to mention, experienced a similar unconstitutional interference.

PETERSFIELD.

1688. The extent however to which proceedings went, may be collected from this fact, that in the convention Parliament, the precept to *Petersfield* (amongst other places) was directed to the chief magistrate, or such others of the borough of *Petersfield*, as had a right to make returns *according to the ancient usage of the borough*, before the seizure or surrender of charters, in the time of King Charles II.

IRELAND.

Generally speaking, the same system of interference with the boroughs and corporations, which prevailed during this reign in England, was extended also to those institutions in Ireland; if not as universally, at least more decisively, and expressly for the purpose of influencing the parliamentary elections.† Thus the year after the Restoration, the following letter was written by Lord Orrery,‡ to “the Sovereign and
 Kinsale. inhabitants of the town of *Kinsale*.”

* Skinner, 154.

† An answer to a letter addressed in this reign to an English Peeress, shows that immediate compliance was not always given to the nomination of members. Sir Joseph Williamson, Secretary of State, wrote to Lady Anne, widow of the Earls of Dorset and Pembroke, and heiress to the House of Clifford and Cumberland, and who possessed the borough of Appleby, to name a candidate to her for that borough; to which application the following answer was returned.—

“I have been bullied by an usurper, I have been neglected by a Court, but I will not be dictated to by a subject; your man shan't stand.

“Anne Dorset, Pembroke, and Montgomery.”

‡ Orrery State Letters. The Earl of Orrery was at this period one of the lords justices.

" Gentlemen,

Dublin, Nov. 26, 1661.

Charles II.

Kinsale.

1661.

" His majesty having commissioned the lords justices speedily to convene a Parliament here, they, in order thereto, have sent out writs to the several counties and boroughs in this kingdom for electing members to serve in Parliament, which will begin the 8th of May next, and therefore shall entreat you to choose Colonel Randle Clayton, to serve as one of the burgesses of the corporation. And if you have not agreed upon another for yourselves, then William Fitzgerald may be the other; and one or both, if chosen, *shall serve you gratis*, and act as earnestly in your concerns as any other you shall choose. The performing whereof shall be acknowledged as a kindness done to your friend and servant.

" Orrery."*

" For my respected friends the sovereign and inhabitants of the town of Kinsale."

Six years afterwards the following letter was also sent to the same place :—

" Earl of Orrery, Lord-President of Munster, to Sir Robert Southwell, clerk of his majesty's privy councils.

" Sir,

" Charleville, 5th Sept., 1667.

" I have received yours of the third instant, and am sorry you should meet with no readier a compliance from the sovereign and burgesses of *Kinsale* than I find by yours you have done; and although I have not so much experience in the

* The Earl of Orrery, who, as Lord Broghill, took so conspicuous a part during the Protectorate, having declared for the restoration of the Stuart dynasty, he was, in 1660, created Earl of Orrery; sworn of the king's privy council, appointed one of the lords justices, and lord president of Munster.* His character was so celebrated as a judge in his presidency court, that the king, and the Duke of York, offered him the seals, after the disgrace of Clarendon. The Earl of Orrery, also, drew the famous act of settlement, by which titles to the property of the Irish nation were granted and secured.

In a letter of April 9th, 1678, among the State Papers and Correspondence of the Earl of Orrery with the Duke of Ormond and Sir Robert Southwell, he states,

* Vide post., Kinsale.

Charles II. law as to advise you which way to proceed in your business, yet I am not of Mr. Ryan and Mr. Hoare's opinion, who say, that a corporation, being an invisible body, cannot be sued.* If such quibbles are in the law, I am a stranger to them: but I think that, in honour and conscience, all engagements ought to be performed to whomsoever the management of the new charter is committed. I know my lord-lieutenant hath ordered that none in this province *shall pass without my approbation of the persons to be nominated in it*; but that will take up some time before it be performed, for until Cork, Waterford, and Limerick, the three cities of this province which must be first preferred, have their charters, the charters of any other of the corporations will not be permitted to be proceeded on. Although I am of opinion that the opposition given to your lease by some of the burgesses is a juggle, yet I can say no more than this, that *if your contest comes judicially before me, I shall not vary from the opinion I have of your bargain, nor from anything else which may be against favour or kindness to you*, and I do believe your procuring the opinion of this provincial court, that your contract ought to be made good, will be no small inducement to procure a clause for it in the new charter," &c. &c. &c.

STATUTES.

The statutes also in Ireland proceeded much in the same
1660. course as in this part of the kingdom.

Cap. 1. They commence with a recognition of the king's title to the throne; and of renunciation and abhorrence of the rebellious and traitorous patricide of King Charles I.

"The growth of popery will be, I find, much taken to heart. I confess that is a plant I would not have thrive in his majesty's dominions. I am one that detest persecuting any for conscience, but I would not have those too high which make persecuting all others for their conscience a canon, and consequently a duty of their religion." ✓

These letters present a most perfect delineation of the private events which characterise the period between 1661 and 1679—are also highly illustrative of the real administration of the law—and the general state of Ireland;—but we purposely abstain from other extracts, which might seem to apply too much to the present times, and have the appearance of party feeling.

* This was the argument of Sir George Treby, the recorder, and Mr. Pollerfen, in the London quo warranto. The metaphysical extravagance of it is too absurd for the sober decisions of judicial investigation.

An act for the confirmation of judicial proceedings, and for ^{Charles II.} their continuance. Cap. 2, 3.

In the succeeding year, there are also acts for raising money 1661. for his majesty's service, for continuing the customs and excise Cap. 1. and subsequent statutes as to the poundage and tonnage; and Cap. 3. an act for the better execution of his majesty's *declaration for* 1662. *the settlement of the kingdom*: which is followed in the statute Cap. 2. book by the king's declaration: with instructions to the commissioners, who are also appointed; and the regulations are given at great length.

There are also rules relative to trade, giving to every mer- Cap 9. chant free liberty to trade, distinguishing between *natives* and *strangers*, and those *born* out of the dominions of his majesty, and afterwards made denizens.

And an act for the real union and division of parishes: and Cap. 10. concerning churches and free schools.

Another statute for encouraging Protestant strangers to Cap. 13. *inhabit* and plant the kingdom of Ireland.

An act for an additional revenue to his majesty, for the Cap. 17. support of his crown and dignity; and for licenses for the Cap. 18. selling of ale and beer.

An act corresponding with that in England, for taking Cap. 19. away the courts of wards and liveries, and tenures in capite, and by knight service.

An act for explaining doubts in the act of settlement. 1665. Cap. 2.

An act for the uniformity of public prayers, &c. And Cap. 6. another for the provision of ministers in cities and corporate Cap. 7. towns.

A statute for the better collection of hearth money. With Cap. 18. respect to which it may be observed, that this tax is imposed on the owners and occupiers of houses, as we have seen the *scot* and *lot* were from the earliest period. And as a confirmation of the property of the clergy being generally discharged from burdens of this description, a special clause is introduced to make them liable to this particular tax. For which their peculiar position will readily account.

A further declaration was made for the removal of doubts

Charles II.

1673.

The New
Rules.

as to provisions under the act of settlement, which are generally termed "*the new rules*." They run to great length; and specific rules are made for Dublin, Drogheda, Limerick, Galway; and also a set of rules for Cork, Waterford, Kinsale, Youghal, Cashel, Clonmel, Athlow, Londonderry, Carrickfergus, Coleraine, Strabane, Charlemont, Trim, Dundalk, Kilkenny, Wexford, and Ross; and other "rules for the regulation general of all cities, walled towns, and corporations in Ireland; and the elections of magistrates and officers there, for which no other particular rules had been made." They state an address made to the Duke of Ormond, as lord lieutenant, by the commissioners appointed by the king, specifying the doubts which had arisen upon the cases before them, as to the construction of the act of settlement.

Declara-
tion.

The lord lieutenant and council therefore make a declaration to remove those doubts. After which follow the different rules to which we have referred, relative to the election of mayors and other officers, and the oaths to be administered to them. Those for *Dublin* declared the number of the common council, consisting of the mayor, sheriffs, and aldermen, and the sheriffs' peers, not exceeding 48; to be chosen out of the several guilds and corporations of the city, specifying the manner in which they were to be nominated. "And any person pretending to be one of the commons not having been duly elected, was to be disfranchised. The fine is fixed for the admission of all foreigners, strangers, and aliens, as well others as protestants, who are merchants, traders, artificers, seamen, or otherwise skilled and exercised in any mystery, craft, trade, or in the working or making of any manufacture, or in the art of navigation, who were at that time present, *residing* and *inhabiting*, or should at any time thereafter come into the city with *intent and resolution* there to *inhabit, reside, and dwell*, should upon their reasonable suit or request made, and upon payment down, or tender of 20*s.* by way of fine to the lord mayor and council, or other persons authorized to admit and make

Dublin.

Residing.

“ freemen, be admitted *freemen* of the city ; and if they should
 “ desire it of all or any guild,* brotherhood, society, or fellow-
 “ ship, of any trade, craft, or other mystery within the
 “ same *during his or their residence, for the most part and*
 “ *his and their families constant inhabiting* within that king-
 “ dom, and no longer ; *and* should enjoy all privileges of
 “ trading, working, buying, and selling as any freemen of the
 “ city might enjoy by virtue of his freedom ; and persons so
 “ admitted are to be taken as denizens.”

Charles II.

1673.

New Rules

Freemen.

Guilds.

The oath of allegiance is then directed to be administered,
 and all other customary oaths ; and that they “ shall pay all
 “ such charges as all freemen of his majesty’s subjects of
 “ the like trade shall pay. And any persons refusing to
 “ admit any such persons shall, upon complaint, and due
 “ proof of such refusal before the lord lieutenant, and other
 “ chief governor, be disfranchised, and from thenceforth be
 “ incapable without their license of being a freeman. And
 “ the stranger, upon tender of his 20s. by way of fine, and
 “ taking the oath before any justice of the peace, shall
 “ thereupon be deemed, reputed, and taken to be a freeman
 “ of the city, and of the brotherhood, &c. where he was denied,
 “ and might from thenceforth exercise all the privileges, &c. ;
 “ and any person interrupting them, shall, upon like com-
 “ plaint before the lord lieutenant, be disfranchised.”

Oath.

The rules are established for ever, and are directed to be enrolled in chancery.

It is impossible for the reader to peruse these rules, and recollecting the history — laws — charters and documents which have been before cited, not to perceive that these directions must have been copied from the ancient privileges and practices of the English and Irish boroughs.

It will be seen in the first place, that the whole rests, as
 common sense, and the reason and object of the regulations, would dictate, upon actual *residence*.

Residence.

Every person of the description mentioned was, upon his request, to be admitted. They were also, in conformity

* Here we find the guilds and fellowships mentioned as distinct from the municipal body, as we have repeatedly pointed out in the English boroughs.

Charles II.

1673.
New Rules

with the ancient practice, so often explained, to pay a *fine*, upon which they were to be *admitted* and *sworn*. And the clear distinction between the general freedom of the city, and the freedom of any guild or mystery, is expressly mentioned.

The other rules, in effect, correspond with these for Dublin.

It is a striking circumstance, that notwithstanding the clear and express language of these rules, and that they are still in force, they have been in Ireland so totally disregarded, that the exclusive system, reducing the sovereign, burgesses and freemen to the smallest numbers, has been uninterruptedly pursued, in direct defiance of these provisions.

The following extract of a letter from Lord Orrery to Lord Ranelagh,* dated Charleville, July 4th, 1642, may in some degree explain what took place at the time of making these rules. The better course will be to let the writer speak for himself. After observing at considerable length upon the claims of the Irish, demanding, from the act of council then lately published, to be free of all the corporations to which they did belong, and that near eight parts of them were neither

Admission
of mer-
chants into
corpora-
tion.

tradesmen, merchants, nor *inhabitants*, of the old corporations, nay, many of them not so much as living in the county where the corporations were, &c; his lordship states, that "he had addressed his majesty upon the subject, suggesting the following regulations: That none of the Irish be admitted freemen; but such only as are, or shall be *resident* usually in the corporations; and they shall pay yearly 20s., in the duty of custom only to his majesty.

House-
keepers.

"That none of the Irish who are made free, shall be of the pannel, (that is capable to elect the annual magistrates and members of Parliament) but such as shall be *housekeepers* in the corporation, and pay 10*l.* in custom duties only to his majesty.

"Hereby none but merchants will be made freemen, and the rabble, which are the dangerous persons, will be excluded; for such as are merchants will have a stock to answer for them; and having an honest vocation, will be

* Southwell MSS.

" apter to follow that, than to mind doing mischief; especially Charles II.
 " having all the just encouragement that can be given to them 1642.
 " to follow their trade and merchandise. He can scarcely de-
 " serve the name of a merchant, who does not trade to the
 " value of 20*l.* a-year; and he can hardly deserve to be of the
 " pannel, who does not pay 10*l.* a-year in duty of customs to
 " the king; so that all merchants may be free of the city, even
 " with the better sort of merchants; and all may be of the
 " pannel, that are of the better sort. This way all traders and
 " merchants may have their fitting encouragement, and their
 " ancient freedom, and yet this way his majesty's garrisons
 " may be kept from being crowded with the beggarly and dis-
 " orderly sort of people; and all the Irish will be encouraged to
 " be tradesmen and merchants, when but 20*s.* yearly duty in
 " custom is required to capacitate them to be freemen, and but
 " 10*l.* yearly duty in customs is required to capacitate them
 " to elect annual magistrates, and members of parliament.

" To which I humbly offer, that none that are made free
 " should pay any duty of the staple: and that none of the Irish
 " should pay above 22*s.*, (which was the ancient rate) for all
 " the offices he must go through in the corporation, to have
 " letters of freedom, &c."

And another letter from the king to the Earl of Essex, the
 Lord Lieutenant of Ireland, dated January 14, 1672, may 1672.
 be inserted for the same purpose.

It commences by stating, that " certain rules concerning
 " corporations, had been lately published by the Irish privy
 " council; but that they had been suspended by his orders, and
 " that, lest the letters of suspension should be misunderstood,
 " and a disallowance of magistrates and officers, which were
 " made in the corporations of Ireland, at Michaelmas last
 " ensue, he had thought fit to approve of all the elections
 " (excepting those, which for special reasons, the earl had
 " not confirmed,) and approved of the election of those nine
 " or ten Roman catholics, into the common council of the
 " city of Dublin.

" That no new charters should be granted to any of the
 " cities or towns corporate, but to induce them to live peace-

Charles II. " *ably with one another, and dutifully towards the govern-*
 1672. " *ment*; and above all things, extinguishing and suppressing
 " by all means and ways you shall judge most proper, the
 " malicious suggestion diffused amongst them, of our desire
 " to infringe, or any ways weaken the late acts of settlement
 " and explanation, which it never entered into our heart to do,
 " either by our late commissions here for inspection into the
 " affairs of that our kingdom, or any indulgence we have lately
 " granted to our Roman catholic subjects, to live in towns
 " corporate, as was expressed in our letters, bearing date the
 " 20th day of February, 1671."

1686.
 Clarendon
 Letters.

In a letter also, from the Earl of Clarendon to Lord Sunderland, dated Dublin castle, July 6, 1686, that noble writer, amongst many other things, says, " that he has sent letters
 " to all the corporations, to give their freedom to all Roman
 " catholics, as to his majesty's other subjects, without ten-
 " dering them the oath of supremacy, and for presenting to
 " me such as shall be chosen into offices, that I may dis-
 " pense with their taking the oath according to the rules. I
 " have already received returns from about twenty of the
 " corporations, and every day I receive from one or other,
 " all full of duty and obedience, saying they have obeyed,
 " and tell me what number of Roman catholics they have
 " admitted; others saying they have appointed such and
 " such days for their public assemblies, that those who would
 " be admitted may have notice, so that the king may be
 " assured, that throughout, it will be settled as he com-
 " manded. In some places where they have two bailiffs,
 " (which are the chief magistrates,) they have without any
 " contest chosen one of each religion, and if due care be taken,
 " there is no doubt they will live very well together." And
 most desirable would it have been, if the noble writer's ex-
 pectations of a peaceful unanimity had been answered at the
 time, and had continued to the present day.

From this correspondence some opinion may perhaps be
 formed of the difficulties in enforcing the new rules, which
 may in some degree account for their having been so shame-
 fully neglected.

In the statutes above enumerated, we have seen that the Parliament did every thing in their power to supply the necessities and support the dignity and honour of the crown. Charles II.

Charles II., immediately after his restoration, had proceeded in the same auspicious manner, regarding the interests of his subjects, by issuing a proclamation which recited that the *inhabitants* of corporations paid various duties towards his restoration—that the withholding from them their charters obstructed trade and the well peopling thereof; and therefore ordered that they should all be restored. 1661.
Charters restored.

“And it having been formerly found by very sad experience, that nothing did more obstruct the growth of trade and increase of manufacture, than the power granted to corporations of restraining all manner of persons, of what birth or nation soever, to set up their trades and manufacture in the cities, sea-ports, and corporations, other than such as had served their apprenticeship in those towns, few of whose masters had ever attained the skill of working the native commodities of Ireland to such a perfection as to make them vendible in the kingdom, much less beyond the seas, so that the whole commodities of the province were only transported in kind, to the great impoverishment of the people thereof, and this only upon the account that no foreigner, though an Englishman, should come and set up in their corporations, and so take their trades out of their hands.”

The king (according to the spirit of the English institutions, and adopting the principles which were subsequently acted upon in the new rules)—“ordered that such a clause should be inserted in every of their patents, as might reserve full power to the chief governors, to admit as freemen into the respective corporations such persons as they in their judgments should find would by such admittance and their *personal residence* there, improve and advance trade, commerce, and manufacture in any of the corporations. Provided, that no recorder or chief town clerk in any of the corporations should enjoy their offices but during the royal pleasure signified by the chief governor or governors of Ireland.” Residence.

Charles II. This order then concludes by vesting the then selection of
 1661. all the corporate officers in the president of the province.

The king also directed, "that the respective former *inhabitants*, natives and freemen, and such as had right to be freemen in any of the cities or towns of Ireland, should
 Restoring. be forthwith *restored* to their accustomed privileges and immunities, and admitted to trade as freely as theretofore."

CHARTERS.

1662. The king, as appears from the Egerton MSS., also granted some charters to the Irish boroughs; one or two of which, as specimens, may be inserted.*

Hillsbo- One to *Hillsborough* commences by reciting, that to the
 rough. end that the English people might be encouraged to resort
 Reside. thither, and to *reside* there for the more speedy planting of
 the manor, the king had constituted 100 acres in the town
 Corpora- and lands of Hillsborough, to be a free borough and cor-
 tion. poration, consisting of a sovereign, 12 burgesses, and the
 commons. That the sovereign, burgesses, and commons
 should return two members to Parliament. That Arthur
 Hill, Esq., should have the appointment of recorder, and town
 clerk, during pleasure. That the sovereign and deputy should
 be the justices of the peace. That the sovereign and burgesses
 Freemen. might make bye-laws, *and admit such and so many freemen as they pleased*: every freeman paying 5s. for his admission, *to the use of the borough*. That the burgesses, commons, and freemen, might make and sell aqua vitæ; and buy and sell wine, ale, beer, and all kind of victuals, and keep taverns, &c., without any manner of license. That the coroner should have the execution of all writs, and that suit and service should be done at the manor of Hillsborough.

The charter to Hillsborough was ten years before the new rules, and therefore the power of admission given by that charter, must either be considered as giving, like the English charters, according to the construction before put upon them, the power of admission, reserving still to persons entitled to the right to demand it; or if it is to be construed as giving

* Egerton MSS. 79. 32.

them an exclusive and arbitrary power of admission, then the charter must be taken as vacated in this respect, by the effect of the act of settlement, and the new rules. Charles II.

Three years afterwards, another charter was granted by Charles II. to the borough of *Antrim*.* Antrim.
1665.

The king being informed, that the town of Antrim, in the rebellion of 1641, was burned to ashes, entirely laid waste and depopulated; and that the present *inhabitants* had, in some measure, rebuilt it; in order that they might be enabled to proceed in the rebuilding thereof, empowered John Viscount Massereene, and his heirs, to hold six fairs within the town. And also liberty to empark 1000 acres near Antrim into one or more parks. And the *inhabitants* of the town to have the privilege of sending members to Parliament. Inhabitants

The latter part of this charter seems to have been granted by the king upon the same supposed power of the prerogative, as the charter of *Newark*, which has been already considered. Newark.

And a similar exercise of that power occurred also with respect to *Granard* in Ireland, Charles II., granting a charter to the Earl of Longford,† which *recites*, that the earl was then in possession of *Granard*, an ancient market town; and that the king, for the better encouragement of the planting thereof, declared, that the present and all future *freeholders* within the town, that were made by the earl, his heirs and assigns, should have full power and authority to return two members to Parliament. Granard.
1678.

And the same power in effect was granted to *Mullingar*, by a charter to Arthur Forbes, Esq. Mullingar
1667.

And in the year 1727, the right of election was declared to be in such *freeholders* as derived their titles under the grantee of that charter; which was then referred to. 1727.

Notwithstanding these particular grants to the freeholders, there seems to have been introduced into Ireland that ano-

* Egerton MSS. 76. 2.

† Egerton MSS. 76. 91.

Charles II. malous right of election for boroughs, and so far the charters were productive of evil, yet it would have been happy for England and Ireland, had the good understanding with the king, the Parliament, and the people continued, which characterised the commencement of the reign. However a different state of things unfortunately too soon succeeded.

The king became dissatisfied with the Parliament, and the Parliament worse disposed towards his majesty. The increasing difficulties of this time are pourtrayed in a letter of the lord lieutenant to the lord treasurer, dated Dublin, 1678. 13th January 1678.*

“The Lord Lieutenant to the Lord Treasurer.

“Your lordship knows how long it is since bills were transmitted from home, in order to the calling of a Parliament here; upon what account, and to what degree, the alteration of affairs have been since. Your lordship knows better than I can, how universal and violent the storm is that the fears of the people of England has raised in them, and cannot but conclude, that those of the protestants here hold proportion with them, and exceeds them, by how much the number of papists here is greater than in England; so that, as the bills which were drawn and calculated for a time of security, cannot be supposed to be fit for the cloudiness of this season, so the temper in elections and debates cannot be the same it would have been, if the changes we see had not happened; from hence I conclude, that the fittest time to call a Parliament here will be, when his majesty and that in England, shall be on better terms than I conceive they are, which all good subjects ought to labour and pray for.”

The increasing bad temper of the times referred to in this letter by no means abated, and the king at last was driven to those violent measures which render any further inquiry into the documents of this period unnecessary.

* Southwell MSS.

SCOTLAND.

As to Scotland, there is to be found at this period an act 1676.
 for the convention of the royal boroughs, which shows
 some of the abuses existing there at that time. It com-
 mences by reciting, that "the general convention of bo-
 roughs had taken into their consideration the abuses that Abuses.
 had happened to the interests of the royal boroughs, in elect-
 ing commissioners to parliaments, conventions of estates,
 and to their own general conventions, such persons as are
not merchants, traffickers, residents, bearing common burden Residents.
with the rest of the inhabitants, and who cannot lose or gain
in the concern of the boroughs, which, as it was contrary to
 many of their acts,* and particularly to the acts of boroughs
 holden at Edinburgh in 1574, at Couper 1586, at Glasgow
 —, and to several other acts of boroughs, and to the ancient
 and primitive constitution of the boroughs by their first erec- Primitive
 tion; so likewise it was destructive to their interest, which constitution.
 ought to be an entire body among themselves, making a
 third distinct estate of the kingdom, without being mixed
 with persons of another rank or quality than of the merchant
 estate, who usually carry on collateral designs, than the solid
 interest of royal boroughs, whereby they become divided, and
 lose their interest and strength, &c.

"Therefore the general convention revived all preceding
 acts of boroughs, by ordaining that *commissioners for Parlia-
 ment*, convention of estates, and to the general and particular
 meetings of the boroughs, should *be of persons conform to the
 qualifications aforesaid*; and that in all the heads, points,
 and clauses of those acts; but also of new statutes, enacts
 and ordains, in all time coming, and which is to be observed
 as an inviolable rule, *conform whereunto all future elections*
 shall be *made*, that *no person shall be elected* or chosen
 commissioners by any of the royal boroughs to conventions
 of estates, and to the *particular and general meetings of the
 boroughs*, but such persons who are *merchants, traffickers,*

* So in England the like course was contrary to the express words of the
 first Henry V. c. 1.

Charles II. *present RESIDENTERS within the borough, commissionating them, and who BEAR COMMON BURDEN WITH THE REST OF THE INHABITANTS, and are such persons who can gain and lose in the concerns of the boroughs; that all elections made of persons not so qualified, be, ipso facto, void; that every person who shall vote for such illegal elections, shall lose the freedom of the borough where he is a burgess and inhabitant; and further certifying, that every particular person accepting of such a commission, not being qualified, shall be liable in the penalty of 1000 marks, as oft as they transgress, and for which fine they shall have no relief from the borough, but shall pay the same out of their own estate. And for the better performance and execution of this present act, the convention ordains, that this clause shall be added to the oath de fideli, which is to be taken of every burgess of every royal borough within the kingdom, at his admission to be a counsellor of their respective boroughs, viz. that he shall not, in any time coming, vote nor consent to the choosing of any person to be commissioner from the royal boroughs to Parliament, &c., but such persons as are qualified in manner aforesaid."*

Non-resi-
dents.

This act not only shows, that the same illegal introduction of *non-resident* members as representatives in Parliament, existed in Scotland as then did in England; but that the remedy provided for it was not as in England, the repeal of the ancient statute which required the residence, but on the contrary, directing that, for the future, all the members should be *residenters*.

Anstruther
Wester.

It appears that the borough of *Anstruther Wester* made, (perhaps in imitation of the English boroughs) a *surrender* in Parliament, of its privileges as a royal borough:* and it was accepted upon the condition, that the rest of the royal boroughs should take upon themselves the burden of its share of the land tax; but that not being done, it was, by an imprinted act of William and Mary of the 22nd of July, 1690, declared, that this borough had never been divested of its royalty, and the chief register was ordered to deliver

* Wight on Elections, 48 n.

back to the magistrates and *inhabitants* their charters of Charles II. royalty.

No commissioner was sent from this borough from 1662 until the meeting of the convention in 1689.*

CONCLUSION.

Notwithstanding the Parliament and the people, tired of the turbulence and uncertainty in which they had long been involved, hailed with satisfaction the restoration of the crown to its lawful possessor, and seemed disposed to concede every thing which was necessary to supply the king's revenue and protect his throne: and notwithstanding, the king also upon his return seemed sincerely disposed to meet the wishes of his subjects; yet, the excitement of religious controversy soon produced dissensions which materially altered the position of both parties.

Parliament dissatisfied, withheld the necessary supplies—the king was driven to foreign and illegal resources—the suspicions of the country aggravated the evils—and at length, the king and the Parliament stood again, upon the irritating point of the exclusion bill, in direct opposition to each other.

Unfortunately the king was advised to take the desperate expedient of attacking the corporations; and as his predecessors, by the steps which have been traced, had given to the municipal institutions of the boroughs a corporate character; so did Charles II., by an attack upon the corporations, seek to obtain an ascendancy over all the cities and boroughs throughout the kingdom.

The methods by which this was effected have been detailed.

A more decisive inroad upon the constitution was never attempted; nor was any measure ever more successful.

The effects of it remain to this day:—from this period of our history, little remains to be explained, but the gradual steps by which this great innovation subsequently produced those evils, now the subject of complaint.

* The borough of Kilrenny also *surrendered* its royalty in the same manner, and at the same time.

Charles II.

Select
bodies.

Non-
residents.

Although at this time the corporate system had been introduced, and parliamentary influence secured, yet comparatively speaking, there had been but few instances in which the exclusive right of the *select bodies* had been supported by direct decisions in their favour; and still fewer in which the right of *non-residents* had been established.

These are two great sources of the modern mischiefs.

The courts of law, up to this period, had also not been directly instrumental by judicial determinations in supporting those abuses.

Corpora-
tion Case,
&c.

The extra-judicial opinions in the Corporation and Dunganon cases were calculated to produce, and have since produced, indirectly, much mischief; and the decisions before quoted and commented upon, which excluded the inhabitants from the enjoyment of the rights of commons they had long possessed, and which in some instances they still maintain, had also their tendency to effect considerable change. But all the consequences had not been at this time fully developed; and there was no specific authority in the courts of law to support the rights of the select bodies—to exclude the rights of the inhabitant householders—or to confirm the usurpations of the non-residents.

From the period at which we are now speaking, there is nothing but an unsatisfactory history of the declension from the simple system of our ancestors, and the confirmation of the abuses which were in truth supported, extended, and confirmed by the decisions of the courts of law—the determinations of committees of the House of Commons—even by the acts of the legislature—and in a great degree by the instrumentality of the people themselves.

After the short and unfortunate reign of James II., hopes were entertained, upon the arrival of the Prince of Orange, that the party then in possession of power, with his assistance and patronage would have corrected the abuses which Charles II. had consummated.

But it is a sad reflection, that these expectations were disappointed. And it has been already shown, and will be confirmed by further facts, which history details, that the

most marked and extensive confirmation of abuses occurred Charles II. shortly after that revolution, which is so often the theme of applause.

From that period they increased in strength: and the collection of the instances to establish these propositions, is all that remains to complete this distasteful portion of our history.

JAMES II.

The Parliament being abruptly dissolved by Charles II. in 1681, during the progress of the exclusion bill, no other was assembled during the remaining four years of that reign.

James II., on his ascending the throne, called together a Parliament, which met on the 19th of May, 1685, and Sir John Fowler was elected speaker. 1685.

Of this Parliament the king himself said, "that there were not above 40 members, but such as he himself wished for." And Burnett, stating that the revenue was granted for life, adds, "and every thing else that was asked, with such a profusion, that the House was more forward to give, than the king was to ask"—so effectually had the seizure of the corporations operated.

It was no wonder, therefore, that the king should be pleased with the members who had been returned, and disinclined to change them.

The king appeared to take no pains to disguise his satisfaction with the House: on the contrary, he took every opportunity openly to avow it; and when the House presented the address expressing their determination to assist the king against the Earl of Argyle, the answer of his majesty was, that "he could not expect less from a House of Commons so composed (as God be thanked,) they were." Monmouth, in the manifesto which he issued on his landing, complained

James II. truly, though intemperately, of the manner in which the elections for this Parliament had been managed.

The open and direct attacks which Charles II. had, towards the close of his reign, made upon most of the corporations, had in many instances been submitted to, and the boroughs had indirectly given themselves up to the influence of the crown.

Had James II. acted upon a different policy, the encroachments of Charles might still have been counteracted, and the evils he instituted checked.

But unfortunately for this country, James pursued the same system of establishing an ascendancy over the House of Commons; and as the effectual means of securing it, continued the power gained by his predecessor over corporations, for the purpose of influencing the parliamentary elections.

Hume justly observes, that "the general resignation of the charters, had made the corporations extremely dependent, and the recommendations of the court were become very prevalent."*

Though they do not immediately bear upon the present investigation, as a part of the history of these times, the rigorous severities of the law in the beginning of this reign under the unprincipled Jefferies, cannot be passed by without notice.

Mr. Justice Powell, in his examination before the House of Commons, 1 William and Mary, 1688-9, stated,† that he conceived one of the reasons of his having been removed from the bench, was the judgment he had given in several quo warranto informations, where the boroughs chose members of Parliament by prescription, especially one against *Marlborough*. The king saying with respect to it, that he hoped all the judges would be of the same opinion.

He also stated, that a quarter of a year before, he was sent for by the Chancellor Jefferies, to take his opinion, whether a borough for a misdemeanour did not forfeit their right of election of Parliament men; and *whether such as*
had no residence in the borough, and were foreign burgesses,

Marlborough.

Residence.

* Vol. viii. p. 220.

† 5 Cobbett, P. H. 311.

had a right of election. He adds afterwards, that he con- James II.
ceived that the misdemeanours of corporations were pardoned by the act of indemnity.

From this it is clear, that the proceedings against corporations and boroughs, in this and the preceding reign, were with a view to control the Parliament.

The seizure of the liberties of corporations, and imposing on them new charters, many of which were granted in this reign, reserving a right of removal to the crown—was one of the most effectual means of placing the corporations Removal by the crown.
entirely at the disposal of the crown, and therefore that view of the subject was openly avowed at the Revolution, whatever practices to the contrary were secretly adopted.

In the first year of William III., the prosecutions of *quo warranto* were unanimously reported by the House of Commons, in a *committee* of the House, to be illegal, and a grievance to the country.* And a bill was founded on this resolution, and passed that House. It was however rejected in the Lords, by a majority of eight proxies,—probably because it had happened that in a few instances where specific causes of forfeiture had been proved, such judgments were “in summo jure” legal.†

The only Parliament which was held during this reign, affords the strongest evidence of the direct attempts made by the king to gain an ascendancy in it.‡

In the House of Lords, 20 peers were introduced in one day.

At the commencement of this reign, nothing could exceed the tenderness which the king expressed towards his people, or the disposition to govern the country according to the principles of the constitution, as may be seen from the following specimen of one of the king’s addresses:—

His majesty at his first sitting in his privy council, was 1685.
graciously pleased to express himself in this manner: §—

“ My Lords,—

“ Before I enter upon any other business, I think fit to

* House Com. Jour.

† 3 Black. Com. 263.

‡ 4 Cobbett, P. H. 1684-5.—1 Jas. II. May 19.

§ Southwell MSS.

James II. say something to you. Since it hath pleased Almighty God
1685. to place me in this station, and I am now to succeed so good and gracious a king, as well as so very kind a brother, I think it fit to declare to you that I will endeavour to follow his example, and most especially in that of his great clemency and tenderness to his people.

“ I have been reported to be a man for arbitrary power, but that is not the only story which has been made of me. And I shall make it my endeavour to preserve this government both in church and state as it is now by law established. I know the principles of the church of England are for monarchy, and the members of it have showed themselves good and loyal subjects, therefore I shall always take care to defend and support it. I know too that the laws of England are sufficient to make the king as great a monarch as I can wish; and as I shall never depart from my just rights and prerogative, so I shall never invade any man's property. I have often heretofore ventured my life in defence of this nation, and I shall still go as far as any man in preserving it in all its just rights and liberties.”

Whereupon the lords of the council were humble suitors to his majesty, that these his gracious expressions might be made public, which his majesty did order accordingly.

Nor were the people wanting in their expressions of devotion to the king. A strong address was presented by the University of Oxford, and also from the Templars;* in which it was stated, “that they thought it their indispensable duty to endeavour the choice of such representatives for the respective counties and boroughs to which they belonged, as might not only concur in settling a revenue sufficient to support the government as formerly; but also show a grateful sense of the great things you have done and suffered for us already; an entire confidence in your majesty's goodness towards us for the future, and a cheerful compliance with your heroic inclinations to advance the honour and interest of these nations. May there never be wanting millions as loyal as we

* Coxe's MSS 9126, &c.

are, to sacrifice their lives and fortunes in defence of your sacred person, and prerogative in its full extent; and incessantly pray the King of kings to grant your majesty a long and happy reign over us.”

James II.

1685.

STATUTES.

Following up the spirit of these addresses, and the disposition of the people to support the king; the legislature passed bills for settling his majesty's revenue for life:—for granting impositions upon wines, &c., tobacco and sugar, and on French linens—enabled his majesty to grant licenses of the lands of the duchy of Cornwall—provided carriages for the king in his royal progress and removal—as well as for the navy and ordnance: and passed an act for consolidating the estates which the king had in the post office—and also the hereditary excise.

1685.

Cap. 1.

Cap. 3.

Cap. 4.

Cap. 5.

CHARTERS.

But in the midst of these proceedings, the king appears to have been still intent upon pursuing the surrenders given by the different corporations, and substituting new charters in their stead; containing the reservation of his power to displace their officers at his will.

Surrenders.

One was granted to *Devizes*:—but the surrenders of the former charter not having been enrolled, the new one was supposed to be void, and was not acted upon after 1688; when the old corporation was restored according to the proclamation of the fourth of James II.

Devizes.

In the first entry in the borough book of *Devizes*, of the date of 2nd October, fourth James II., the names appear to be entered according to the charter granted by that king, in which the superior body are called mayor, recorder, deputy recorder, and aldermen. But it is the only entry in that form.

On the 22d of October, there is an entry containing the election and swearing of a mayor, which is stated to have taken place upon receipt of the proclamation of his majesty King James II. for restoring corporations.

James II. The names vary from those entered on the preceding day,
Devises. though some few are repeated in different situations and
 1688. order. So that it is evidently a meeting of the old corporation, which had been restored by the proclamation.

Truro. The king also granted a charter to the *burgesses and inhabitants of Truro*; giving them and their successors all the manors, lands, &c., privileges and franchises, enjoyed by their predecessors: but reserving a power for the *king and his successors** to *displace, by his majesty's signet and sign manual, any officer* of the corporation.

Maidenhead. A charter was also granted to the mayor, bridgemasters
 1684. and burgesses of the town of *Maidenhead*.

Canterbury The charter of the city of *Canterbury* was *surrendered*,
 1687. and the corporation was new modelled; such persons being put into the government of the city as the king could confide in, to aid him, as was said, in promoting his designs of taking away the test, and of bringing in popery and arbitrary power.

Upon the proclamation however of the king for the restoration of corporations, and after the landing of the Prince of Orange, the old charter was restored.

Ipswich. The king held out to the borough of *Ipswich*, a prospect of recovering the privileges they had lost, by granting to them a new charter, which in many respects resembled the former, but contained the two following clauses, which in effect placed the corporation in the power of the crown.

“Provided always, and we do reserve full power and authority to us, our heirs, and successors, by these presents, at all times hereafter, by any order in privy council made to remove the said or any other bailives, portmen, chief constables, recorder, deputy recorder, town clerk, or coroners, or any one or more of the other officers of the town or borough,

* This power given to the crown, of displacing the officers was, in the *Chester Case*, *Rex v. Amery*, 4 T. R. 122, held to be illegal, and the charter so far void.

and to declare him or them to be removed. That if at any time hereafter, within twenty days after the removal of any one or more of the bailives, portmen, &c. from their places respectively, the remaining bailives, portmen, and chief constables of the borough shall be ordered by letters mandatory from the king to the remaining bailives, portmen, and chief constables directed, to elect, admit, and swear any other person or persons of the nomination of the king, to or in the several and respective places or offices, of any persons so from thence removed; that then it shall be lawful for the bailives, portmen, and chief constables of the borough (how few soever in number they may happen to be), or the greater part of them, who upon public notice or summons shall be present, to elect and admit every such person or persons respectively to and in the place or office of the person or persons respectively so from thence removed or deceased, as in that case from time to time hereafter, by such letters mandatory, shall be respectively appointed. And that in such case every other election or admission had, contrary to the tenor of these presents, or contrary to the exigence of such mandatory letters, shall be void.

“And moreover, for divers considerations, and by virtue of our prerogative royal, we have dispensed and discharged William Brown and Edward Gale to be bailives and portmen of the town or borough: and the ten portmen, the 20 common councilmen, the town clerk, and every other officer or servant, within the borough, hereafter to be nominated, or elected, or admitted; from taking the oath of supremacy, and the oath of allegiance mentioned in the act of Parliament of the third of James I., or in any other statute; and also from taking the oath mentioned in a statute, the 13th of Charles II., for the well governing and regulating corporations; and also from taking the sacraments, according to the rites of the church of England; and also from the taking and subscribing the declaration mentioned in that statute, and in another statute of the 25th year of the same reign.”

But the proclamation restored the rights and liberties of the

James II. corporation (when they were, to all appearance, irrecoverably lost), and the effects of this arbitrary charter were prevented, for the validity of it could on no ground be maintained, inas-
 Surrender. much as the deed of *surrender* on which it was founded was
 Enrolment. illegal and *not enrolled*. And therefore, in this case, as in others, all that had been built on the supposed validity of that surrender of course fell to the ground, the ancient charters reviving, and by them the burgesses of Ipswich have since been governed.

BRISTOL.

1688. *Bristol* also, in the same manner, acted upon the proclamation, and proceeded to elect fresh officers for the remainder of the year under their former charters.

POOLE.

1688. A charter of restoration to *Poole*, reciting the good services
 Burgesses. of the *burgesses* and *inhabitants* releases to them and the mayor, bailiffs, burgesses, and commonalty, the judgments
 Inhabitants obtained against them, or against the *inhabitants*, by the name of *mayor, bailiffs, burgesses, inhabitants, and commonalty*, or any other name or names in Easter Term, 26 Cha. II., and Hilary Term, 2 Jas. II., and restores and grants to the burgesses and *inhabitants, as also* to the mayor, bailiffs, burgesses, and *commonalty*, all the liberties, &c. which they had before the judgment, by the name, or in the right of the burgesses, or *inhabitants*, or by what name soever the *incorporate body* was called, and that the burgesses and *inhabitants* should be
 Corporate. called one body corporate, by the name of "the mayor, bailiffs, burgesses, and commonalty."
 Remarks. From this strange document it is at least to be collected, that *inhabitants* and *commonalty* were *synonymous* terms in this borough; and if to this be added, that burgesses meant also the same, to the exclusion only of such inhabitants who could not be burgesses, a clue will probably be afforded to the due understanding of all the charters granted to this borough, and the terms used in them, particularly the variety of synonymes adopted in this extraordinary charter.

James II.

EVESHAM.

1688.

Evesham, like many other places, *surrendered* its former charters during this reign, and took a new grant at the discretion of the crown. Surrender.

A charter of the fourth year commences with a recital similar to that of Charles II., and then adds, that “the charters, “by reason of *certain defects or negligences of the INHABITANTS* “of the borough, had become determined and void, whereby “the incorporation of the borough is totally dissolved, and the “*inhabitants* had petitioned, that such other liberties and “privileges should be conceded to them as to the king should “seem fit.”

The charter then speaks of the *BURGESSES*, and grants that Evesham should be an incorporated borough, and incorporates the *burgesses*, in the same manner and by the same name as the charter of Charles II., with the usual corporate powers—and that there should be nine aldermen, and twelve *capital burgesses* with a recorder. Incorporate.

At a subsequent part of the charter it is provided, that every alderman, capital burgess, assistant and other burgesses, who should absent himself from the borough for the space of *one whole year*, without the license of the mayor, aldermen, and capital burgesses, or eleven or more of them, *should lose* the liberties and privileges of a *freeman* and *burgess*. Power is reserved to the king to remove the officers of the corporation at his pleasure, upon which they are enabled to elect others; and there is a proviso, that if after twenty days the vacancies are not filled up, then the remainder, however small their number, may elect other persons into the vacancies. Absence. Removals. Elect others.

CHESTER.

This king also granted, in the last year of his reign, a charter of restitution, to the *citizens* of *Chester*, which commences with a recital,* that in consideration of the good services which the mayor and citizens had rendered, and to promote the good government of the city, the king had 1688.

* This charter extends to great length, but the substance is here extracted.

James II. pardoned and released to the mayor and citizens, the judgment given against them in Hilary Term, in the 35th and 36th of King Charles II., upon an information in the nature of a quo warranto, which had been exhibited against them, and also all seizures and process thereupon.

Chester.
1688.

The charter then proceeds to regrant them their former privileges, and to reinstate all their municipal officers.

HUNTINGDON.

King James II. recites, that the borough of *Huntingdon* having been endowed with many liberties and privileges, and the *burgesses* there having enjoyed divers franchises, &c. by reason of ancient customs and charters, the late king willing for the future, that a certain method should be had for the better government of the people there, granted that the borough should be free, and the *burgesses and inhabitants* a body politic, by the name of "mayor, aldermen, and burgesses of the borough of Huntingdon," &c. &c. &c. That there should be one nobleman, who should be called *chief high steward* of that borough, and *twelve aldermen*, whereof one should be chosen mayor. That the mayor, recorder, and aldermen should be the common council, and the rest of the burgesses should be present at the command of the mayor; also, that they should have a person honest and discreet, to be their recorder, to continue for life. That the mayor, recorder, or alderman, or the greater part of them, who upon summons should meet together, should have power to make all laws and constitutions, which should be necessary for the government of the burgesses, artificers, and inhabitants there.

That the mayor for the time being, should be *coroner and clerk of the market*, of the king's household, with a power reserved to the king at his pleasure, by order in privy council, to remove the chief steward, recorder, and town-clerk, &c.

The charter concludes, by confirming to them all their ancient jurisdictions, with their *court leet*, &c.

WELLS.

There was also another charter of this year, granted on the request of the inhabitants of *Wells*: but it appears from the corporation books, that it was abandoned; and on the 1st of November, 1688, they availed themselves of the proclamation of James II., for the restoration of their ancient privileges.* 1687.

This king recites that the several charters granted to Wells had, by the abuses of the *inhabitants*, become determined and void. 1688.

That the *inhabitants* had prayed, to have granted to them such privileges and liberties as should be deemed expedient; and hoping that if the *burgesses* and *inhabitants* had them granted, they would feel themselves bound to bestow their services upon the king and his successors: the king then grants that Wells should be a free borough or city; that the *burgesses* by whatsoever name they had been incorporated, should be from thenceforth one body corporate and politic, by the name of "the mayor, aldermen, and burgesses of the city or borough of Wells, in the county of Somerset." Corporate.

The usual corporate powers are then given; and the government of the town confided to one mayor, seven aldermen, and 16 capital burgesses, who were to compose the common council, and to have the power of making bye-laws, &c.; but that all the corporate officers should be removable by order of the privy council, and the grant closes by confirming all their ancient customs, &c. Common Council. Removal.

These charters are sufficient to show the nature of those which were granted at this period—the circumstances under which they were obtained—and the reasons upon which they were afterwards, generally speaking, held to be void.

* This, in the case of *Newling v. Francis*, 3 T. R. 189, was held to operate as the acceptance of a new charter, and to have the effect of superseding the surrender to Charles II., and restoring the ancient grants.

James II.

MUNICIPAL DOCUMENTS.

One or two municipal documents, to illustrate the history of the boroughs at this period, should be mentioned.

The matter of annexing the Castle Garth of Newcastle, and dismembering it from the county, having been referred, by the lords of the treasury to the then attorney-general, he reported, that " he conceived it might be more fit for the government of " the *inhabitants* of Castle Garth, if that place was put within " the limits and jurisdiction of the town of Newcastle, which " might be done by the king's letters patent, with a proviso " that the assises and sessions be kept there for the county as " formerly ;" upon which, a grant passed the great seal of his majesty upon the one part, and the mayor and burgesses on the other, for the term of 31 years, at an annual rent of 100 chaldrons of coal, to be delivered in the port of London.

The king's rents in the castle were excepted ; also the " Moot Hall" within the walls, where his majesty's justices were used to hold their assizes, sessions, and gaol delivery, &c.

From a view of the Castle Garth, made by commissioners
1685. in the year 1685, the rental of premises by building and improvements, amounted to 149*l.* 1*s.* 8*d.* per annum ; but it was alleged it arose to that height, *by strangers and fugitives harbouring there in a place not* subject to the government of the town.

From which it will be seen, that the castle was separate from the borough, and that the ground of its annexation, was the fact of fugitives going there to escape the jurisdiction of the borough. And the actual interference of the king with the borough, may be collected from the fact, that on the 30th
1687. of June, in the third year of this reign, Sir William Creagh, Knight, a zealous papist, was admitted to the freedom of the corporation of Newcastle, *in consequence of a mandate from the king.* He was the next year appointed mayor.

NEWCASTLE-UPON-TYNE.

1688. On January the 16th, in the last year of this reign, a flattering address, intended to have been presented to the

king by the corporation of Newcastle, and signed by Sir James II. *William Creagh, Knight, mayor,** and other aldermen, some of whom were papists, and others dissenters, with some of the common council, was *negatived by a majority of that body*, and not sent.

But it is said,† a surrender of the charter was actually sealed and transmitted to London; although it was not enrolled.‡

In a letter, dated November 3rd, in this year, subscribed by Silvester Petyt, and directed to Mr. Douglas, is the passage:—"As for the proclamation and orders touching the "corporations, I was at the Crown-office, and the clerk told "me they were sent under seal to all the corporations; "and that Green, a messenger, had those for Newcastle, and "believes you have them before this: and because you think "the Gazette not sufficient, I have sent you the proclamation "and order, printed by the king's printers, and think you "may (if the other be not come) give credit to these."§

EVESHAM.

In the constitutions and ordinances for the better govern- 1687.
ment of the borough of *Evesham*, made at this period, by the mayor, recorder, aldermen, chamberlain, and capital bur-
gesses, it was provided, that every *apprentice*, after he had actually and bona fide served the time of his apprenticeship, should be *made free* of the borough—take the usual oaths of a freeman—and pay the accustomed fees. And if the apprentice neglected to do so for 12 months, he was to lose the benefit of his freedom. Clause 14.
Appren-
tices.

That every *freeman, commorant* and *inhabitant* of the bo- Clause 16.
Commo-
rant.
rough, should bear and pay all manner of taxations, fines, &c.; and if he refused so to do, he might be distrained, &c., or the mayor and common council might disfranchise him.

That if any of the *inhabitants* of the borough, being of the Clause 18.
common council, or otherwise, should use opprobrious or

* See admission, year before, by the king's order. † 2 Brand's App. p. 642.

‡ See the proclamation for restoring the corporations, 4 James II., Newling v. Francis, 3 T. R. 189.

§ 2 Brand's Appendix, p. 543.

James II.
1687. contemptuous words or gestures against the mayor, common council, or any of the masters or wardens of the companies, or do anything derogatory to the ordinances of the borough, the mayor and common council might punish such persons by fine, disfranchisement, or imprisonment.

Clause 21. The 21st clause commences with a recital, that the *inhabitants* of the borough, for the better regulation of their trades and occupations, had *formed themselves* into divers

Companies companies and fraternities—viz. the company of mercers—cordwainers—clothworkers—glovers—ironmongers,—and had enjoyed divers constitutions and orders respectively; nevertheless, through the licentiousness of the late wars, confusion had got into the place of order, and many indirect ways had been taken to lessen and bring into contempt the good government of the borough. And amongst other innovations, several of the companies had taken upon them-

Strangers. selves to make many *strangers* free of their companies, without so much as acquainting the mayor and common council: and under the notion of this supposed freedom, such strangers and others, that are so brought in, *refuse to*
Sworn. *be admitted and sworn* freemen of the borough, to the prejudice of the common council, and contempt of good government: it was, therefore, ordered and constituted, that no person of the respective companies should presume to admit, swear, or otherwise take into their companies, any person, until the master or wardens, and the mayor and common council, should have consented and agreed thereunto in writing.

Oath. That they should take the oath of a freeman as prescribed in the charter of the 36th of Charles II. Every other admission to be void.

Appren-
tice.
Freemen. That no person within the borough should fraudulently or colourably presume to take any *apprentice*, with intent to make him a *freeman*, without performing seven years' actual service at the least. That the indentures should be *enrolled* with the chamberlain; and if not, the master was to be disfranchised, and the apprentice should take no benefit as to the freedom of the borough.

That the relict of every freeman might use the trade of her deceased husband during her widowhood; and the eldest son of every freeman alive at his death, should be made free by his father's copy, if required. James II.

HYTHE.

At an assembly of the mayor, jurats, and commoners of Hythe, held in the first year of this reign, the question was put, whether Stephen Heeler, who *hath lived out of the liberty by the space of one whole year and a day last past*, should be from thenceforth deemed as a *freeman* of the corporation; and it was carried in the *negative*, nemine contradicente. 1685.

HASTINGS.

And at *Hastings* there was a custom, that if any man lived a year and a day out of the town, and did not pay *scot and lot*, he hath no vote.

ROMNEY.

There were also at this period ordinances made at the Brotherhood and Guestling, held at the town and port of New Romney, in the third year of James the II., which commences by reciting the decree of Brotherhood, made in 1603, before quoted;* and then states, that the assembly found that the decree was not so effectual as to compel such *inhabitants* to be made free in their *respective corporations* where they *inhabited*, but that several persons evaded it, and the penalty therein contained, by refusing to appear in *full and open court* where the oath is to be required and tendered, and by divers other subtle devices; wherefore, for preventing such evasions, and for the better upholding of the several corporations of the ports, towns, and members, which otherwise might cease and be annihilated, it was ordered, that the penalty of 10*l.* mentioned should be imposed and levied upon every *inhabitant* of any of the ports, towns, or members, who should be elected a *freeman* of such respective corporation wherein 1687.

Inhabitants

Court.
Oath.

* See before, p. 1502.

James II. he was *inhabitant*, according to the ancient decree; and in
 1687. case *such inhabitant* so elected should neglect or refuse to
 appear at the next court of record, to be holden in such
 Dwelled. corporation wherein he *dwelled*, upon verbal or other sum-
 mons from the mayor or bailiff, or upon appearance at the
 court should refuse, or neglect to take the oath, so often as
 such *inhabitant* should so refuse or neglect, he should for-
 feit for every such offence the like sum of 10*l*.*

CASES.

A few cases also occur in the law reports of this reign,
 which it may be proper to insert, for the purpose of illus-
 trating the particular history of some boroughs.

Bristol. A person of the name of *Light*, in the second year of James
 II., brought an action against *David Pym* and *Roger Adams*,
 for seizing his malt.†

The defendants pleaded the charter of the 36th Charles II.,
 granting a market and reasonable toll to the citizens of
Bristol.

The plaintiff replied, that he was a *burgess* of *Tewksbury*,
 and by a charter of 11 Edward III., he was free of toll.

The defendants rejoined, that the *burgesses* of *Tewksbury*
 had surrendered their charters.

It was determined, that the toll was not demandable, be-
 cause it was not alleged that the malt was *sold*; and this
toll could not be claimed by prescription, for the *corporation*
was created within time of memory.

It is therefore clear, by this distinction, that Bristol was
 not a corporation by prescription.

1688. It was admitted in argument, upon a case of this period
 respecting toll,‡ “that all the *inhabitants* within the liberties
 Lancaster. of the duchy of Lancaster were discharged from paying toll
 throughout England.”

* Howell, State Trials, vol. xvii. p. 815.

† 2 Lutw. 1332.

‡ Osbuston v. James, et al. Lutw. 442.

JOURNALS.

A few extracts only from the Journals will be necessary to show the progress of the parliamentary proceedings with respect to the cities and boroughs.

Parliament met on the 19th of May, in the first year of this reign. 1685.

Amongst the many petitions relative to elections which were presented, some were by the *inhabitants* of the boroughs:—as *Wallingford** — *Scarborough*† — *Thetford*‡ — *Sandwich*§ — *Shaftesbury*.||

It appears from the Journals,¶ that on the 27th of May, a debate arose touching several *royal charters*, supposed to be granted to divers boroughs, which had a right by prescription to send burgesses to serve in Parliament; *whereby*, as was alleged, *an alteration is made in the manner of their ancient elections*; and the debate was adjourned till the following Saturday.

CRICKLADE.

The right of election for *Cricklade* was *agreed*,**—not decided—to be in the freeholders, copyholders, and leaseholders, for three years—a right for which there could be no pretence, beyond the interest of the litigant parties to establish it; unless it meant the *inhabitant householders*, whether they were freeholders, copyholders, or leaseholders.

MONTGOMERY.

As to *Montgomery*, the right was determined, like that of Brecon, not to belong to Montgomery only, but also to the contributory boroughs of Llanidloes, Poole, and Lanvilling.

THETFORD.

With respect to *Thetford*, the circumstances of the *surrender* of whose charter will be hereafter referred to, and which has been already remarked in Domesday as a *borough*,

* 9 Journ. 716. † 1b. 719. ‡ 1b. 721. § 1b. 723.
|| 1b. 723. ¶ 1b. 721. ** 1b. 732.

James II. and its *burgesses* enumerated as *householders*, in connexion
 Thetford. with their houses, a strange decision was made—according to
 House- the spirit and practice of this reign, but without the state-
 holders. ment of any evidence which could justify it—that the right
 Right. of election was “in the mayor and *burgesses*, which are ten,
 “and in the commonalty, or common council, which are
 “twenty; amounting in the whole to 31.” How it was
 Common- possible for a committee to determine that the “com-
 alty. monalty” and “common council” could be synonymous,
 Common and import the same class of persons, when it is obvious
 Council. that the common council must, from the import of the term,
 be selected out of a larger body, must be left to the ingenuity
 of Dr. Brady, or any person who may be induced to support
 his theory, to explain.

Thetford did not return members to Parliament until the
 1573. reign of Edward VI.; and was incorporated in the 16th year
 1554. of Queen Elizabeth. In the first year of Queen Mary, the
 return was made in the most general manner by the “mayor,
 “burgesses and other men of the common council, and
 “congregation of the borough.” And the same form was
 1558. adopted in the first year of Queen Elizabeth.

Nevertheless this right was, in the second year of William
 and Mary, *agreed* to be as determined above.*

But a question arising, who was the proper returning officer,
 the petitioners, relied upon the return by a mayor appointed
 under the old charter, and the sitting member upon the re-
 turn by a mayor under the new charter:—the committee de-
 cided, that the charter of the 16th of Elizabeth was not duly
 or legally surrendered.

1699. In the 11th of William III., the right was again *agreed* to
 be in the select body, and it continued in them afterwards.
 The power enjoyed by that body, leading subsequently to
 numerous instances of legal litigation.

1688. In the last year of this reign, the usurpations of the crown
 became direct and open. “By the practice of annulling the
 “charters,” as Hume observes, “the king was become master

* 10 Journ. 339.

"of all the corporations; and could at pleasure change every ^{James II.}
 "where the whole of the magistracy. The dissenters were 1688.
 "first in London, and afterwards in every other corporation,
 "substituted in the place of the members of the church."

James II. also appointed regulators to examine the qualifications of electors.

Instances of the encroachments upon the rights of the inhabitants may be found in the Journals and elsewhere.

In some places, particularly in *York*, the elections were ^{York.}
 transferred from the people to the magistrates: who, by a new charter were all named by the crown, which was in reality, as Hume observes, "nothing different, from the
 "king's naming the members."

In the case of *Thetford*,* it appears from a subsequent inquiry in the succeeding reign, that the surrender had been ^{Thetford.}
 obtained by the illegal interference of a person of the name of "Mendham:" who being mayor in 1681, and his year 1681.
expiring, refused to swear in his successor. On a mandamus being obtained to compel him to do so, he was afterwards taken into custody for his contempt in not obeying it; and in order to get his discharge, he procured a surrender of ^{Surrender.}
 the charter by a pretended majority of the corporation, made up by his son, who was under 16 years of age, and an excommunicated person; both of them received the sacrament to qualify them to be of the corporation.

But before the surrender was enrolled, the other members, to the number of 17, did all they could to prevent it. So that, in fact, there were 17 against the surrender, and only 14 for it. But the 17 were never called or summoned at the time the surrender was agreed upon.

The indecorous circumstances attending the taking of the sacrament by the two who were attempted to be qualified, are mentioned in the Journals.

And in a subsequent page,† a petition states the clandestine means by which the pretended surrender had been obtained; and that "*Mendham*" had turned out many of the burgesses who would not consent to the surrender; and appointed

* 10 Journ. 139.

† 10 Journ. 302.

James II. others in their places who were not duly qualified: and by
 1688. those means he procured the old charter to be surrendered,
 Burgesses. and obtained a new one, whereby the *burgesses* were excluded from voting.

This case may serve as one of many instances, to show the manner in which these surrenders were effected.

It was not possible that such a state of things could long exist: at length, the Prince of Orange landed in the west: a petition for a new Parliament was signed by 24 bishops and peers of the greatest distinction, and was presented to the king; and accordingly he issued writs for a new Parliament; which, however, were soon recalled.

But, as the last act of his expiring power, too late to retrieve the errors he had committed, and only in time to show that he was sensible of them, and desirous if possible, of correcting them—the king, when he had fled to Faversham, published a *proclamation* for restoring the corporations,* which commences with a recital—that several deeds of *surrender* having been lately made by several corporations and bodies corporate, of their charters, franchises, and privileges, which had not been *recorded* or *enrolled*; and that upon the proceedings and rules for judgment which had been lately had upon the quo warrantos, judgments had not yet been entered on record: whereupon, notwithstanding new charters had been granted in the reign of King Charles II.; and in his own; which deeds, not being enrolled, did not amount, or in law, make any surrender of the charters, franchises, or liberties mentioned: and such of the corporations against which rules for judgments had been made in the lifetime of King Charles II., or since, in the Court of King's Bench; but no judgment entered upon record, were not disincorporate or dissolved. And that it was in the king's power to leave such corporations in the same estate and condition they were in; and to discharge all further proceedings that might be, of such rules for judgment and deeds of surrender. That the deeds of surrender made by the corporations and bodies politic, except the following, viz.—*Thetford, Notting-*

Proclama-
tion.

* See 2 Luders, 260.

ham, Bridgewater, Ludlow, Bewdley, Beverley, Tewkesbury, Exeter, Doncaster, Colchester, Winchester, Launceston, Lisheard, Plympton, Tregony, Plymouth, Dunwich, St. Ives, Fowey, East Looe, Camelford, West Looe, Tintagel, Penryn, Truro, Bodmin, Hadleigh, Lostwithiel, and Saltash, were not enrolled or recorded in any of the king's courts.

James II.

1688.

That though rules for judgment had passed upon informations against the corporations and bodies politic of several cities and towns, yet no judgments had been entered upon record upon any such informations, except against the *City of London, Chester, Calne, St. Ives, Poole, York, Thaxted, Llaughour, and Malmsbury.*

That to restore and put all cities, towns, and boroughs in England and Wales, and also the town of Berwick upon Tweed, into the same state and condition they were in, before any deed of surrender was made of their charters, franchises, or proceedings against them, the king directed, that the corporations and bodies politic of all cities, towns, and boroughs, whose deeds of surrender were not enrolled, nor judgments entered against them; and all the members in every of them respectively, should immediately proceed to act as a corporation or body politic; and when places were vacant, to make immediate elections, and to execute every matter and thing as they lawfully might have done, if no such deeds of surrender or rules for judgment had been had or made.

That all the corporate officers from their offices had been dismissed, which they claimed to hold only by charter, grant, or patent, from Charles II., or the king; since the dates of the respective deeds of surrender, &c., except such corporations whose deeds of surrender were enrolled, or against whom judgment was entered.

The king also promised he would grant to the cities, corporations, and boroughs, any further act to confirm unto them all their charters, &c. which they at the times of such deeds of surrender held or enjoyed.

"That as to those corporations which had made deeds of surrenders, or had judgment given against them, and which

James II.
1687. contemptuous words or gestures against the mayor, common council, or any of the masters or wardens of the companies, or do anything derogatory to the ordinances of the borough, the mayor and common council might punish such persons by fine, disfranchisement, or imprisonment.

Clause 21. The 21st clause commences with a recital, that the *inhabitants* of the borough, for the better regulation of their trades and occupations, had *formed themselves* into divers

Companies companies and fraternities—viz. the company of mercers—cordwainers—clothworkers—glovers—ironmongers,—and had enjoyed divers constitutions and orders respectively; nevertheless, through the licentiousness of the late wars, confusion had got into the place of order, and many indirect ways had been taken to lessen and bring into contempt the good government of the borough. And amongst other innovations, several of the companies had taken upon them-

Strangers. selves to make many *strangers* free of their companies, without so much as acquainting the mayor and common council: and under the notion of this supposed freedom, such strangers and others, that are so brought in, *refuse to*

Sworn. *be admitted and sworn* freemen of the borough, to the prejudice of the common council, and contempt of good government: it was, therefore, ordered and constituted, that no person of the respective companies should presume to admit, swear, or otherwise take into their companies, any person, until the master or wardens, and the mayor and common council, should have consented and agreed thereunto in writing.

Oath. That they should take the oath of a freeman as prescribed in the charter of the 36th of Charles II. Every other admission to be void.

Apprentice.
Freemen. That no person within the borough should fraudulently or colourably presume to take any *apprentice*, with intent to make him a *freeman*, without performing seven years' actual service at the least. That the indentures should be *enrolled* with the chamberlain; and if not, the master was to be disfranchised, and the apprentice should take no benefit as to the freedom of the borough.

That the relict of every freeman might use the trade of her deceased husband during her widowhood; and the eldest son of every freeman alive at his death, should be made free by his father's copy, if required. James II.

HYTHE.

At an assembly of the mayor, jurats, and commoners of Hythe, held in the first year of this reign, the question was put, whether Stephen Heeler, who *hath lived out of the liberty by the space of one whole year and a day last past*, should be from thenceforth deemed as a *freeman* of the corporation; and it was carried in the *negative*, nemine contradicente. 1685.

HASTINGS.

And at *Hastings* there was a custom, that if any man lived a year and a day out of the town, and did not pay *scot* and *lot*, he hath no vote.

ROMNEY.

There were also at this period ordinances made at the Brotherhood and Guestling, held at the town and port of New Romney, in the third year of James the II., which commences by reciting the decree of Brotherhood, made in 1603, before quoted;* and then states, that the assembly found that the decree was not so effectual as to compel such *inhabitants* to be made free in their *respective corporations* where they *inhabited*, but that several persons evaded it, and the penalty therein contained, by refusing to appear in *full and open court* where the oath is to be required and tendered, and by divers other subtle devices; wherefore, for preventing such evasions, and for the better upholding of the several corporations of the ports, towns, and members, which otherwise might cease and be annihilated, it was ordered, that the penalty of 10*l.* mentioned should be imposed and levied upon every *inhabitant* of any of the ports, towns, or members, who should be elected a *freeman* of such respective corporation wherein 1687.

Inhabitants

Court.
Oath.

* See before, p. 1502.

James II.

1687.

SOUTHWELL MSS.

From William Blathwayte, Esq. clerk of the privy council,
to Sir Robert Southwell.

" Whitehall, April 23, 1687.

Kinsale. " I have considered what you write of the charters of Ireland, and of the means to obtain a saving of your right in that of Kinsale, and expected the former letter from Mr. Madox, who says he has not yet received it. The only persons, I think, to be applied to here, are Mr. Bridgeman and Mountsteven, and the rather because the former has been long in good humour, and continues so. Mr. Pepys would be in earnest for you, if it belonged to his station, but I do not see what you can expect from my Lord Dartmouth. But, after all, I fancy that the thing must be done in Ireland, and by my lord deputy alone; for all those things will be entirely referred to him. If it be so, I hope you have interest enough with his excellency for so small a matter. If I have any with his secretary, Mr. Sheridan, by our military correspondence, I will employ it all for *this job*, and perhaps with a suitable qualification to one that knows the language already," &c. &c.

Letter from William Blathwayte, Esq., clerk of the privy council, to Sir Robert Southwell.

" Whitehall, 3rd Nov. 1687.

" His majesty having reformed the city of London, and regulated the several companies, has been pleased to declare that he will use the like method throughout all the other parts of his kingdom, for the support (as his majesty is pleased to express it,) of his late declaration.

" To this purpose, orders are issued to all the lords lieutenants forthwith to repair to their respective counties, and then having called before them all their deputy lieutenants, officers of the militia, justices of the peace, and the principal gentlemen, to ask them a plain question, ' Whether they are ready to concur with his majesty in the necessary means to confirm his majesty's late declaration, and in the repealing

'of the penal laws and the test, by giving their consent to it James II.
'in Parliament, if chosen, or choosing such as will repeal 1687.
'them.'

"The lord lieutenants have orders to return the names of all those gentlemen, and their answers, to the king; who will immediately put out of all offices and places of trust, such as do not comply, and fill vacancies with such as declare themselves ready to concur with his majesty's desires," &c. &c.

Lord Clarendon in his letters, writing to the lord chancellor, gives an account of a conversation he had had with _____, respecting the king's letter about admitting the Roman catholics into corporations, and putting in justices of the peace and sheriffs. 1686.

The noble writer represents himself as saying, that he was advising about the best and readiest way of doing the business; that he had already discoursed with Mr. Justice Daly about the town of *Galway*, where there were most of the trading Roman catholic merchants, and with which town and country he was particularly acquainted, all his concerns and relations being there; and that he was advising with other Roman catholics, and that it would not be long before he should see that affair in as good a prospect as he could desire. That for the sheriffs, he would give such orders to the judges, when they went their circuits, as was necessary for presenting to him proper persons, Roman catholics, for those appointments.

The rest of this singular conversation may be seen by referring to the Clarendon letters.

The extracts from Hume, and these letters, give shortly the whole history of Ireland at this time, as far as it is in any manner connected with the subject of our inquiry, and it is unnecessary to add anything to these documents.

SCOTLAND.

The history of Scotland for the same period, though differing in some respects, particularly with reference to religion, as far as regards its municipal institutions may be given with greater brevity.

James II. Hume justly observes in one of his notes, " that the same
1686. " acts of authority" and interference which had been adopted
in England with respect to York, and other places, " had
" been employed in all the boroughs of Scotland."*

WALES.

The same observation is equally applicable to Wales, and
Cardiff. the following short extract from the charter of *Cardiff* may
1687. serve to establish the similarity of the clauses which were
introduced into the Welsh charters with those which had
been adopted in England.

This king granted a charter in the third year of his reign,
which contained all the grants and privileges in the charter
of James I., with some few alterations, namely ;

That aldermen should take their oath of office before the
constable or his *deputy*.

And that the constable or his *deputy* should be one of the
justices of the town.

That a power should be reserved to the king, and his heirs
Removal. and successors, to *remove* any or either of the justices of the
peace, bailiffs, aldermen, capital burgesses, stewards, es-
cheators, or coroners of the town, for the time being, at his
will and pleasure, by any order under the seal of the privy
council, to them respectively signified : and as often as the
king should by an order in privy council, declare any of the
officers to be removed, that then the person so removed
should be ipso facto, and without any further process, really,
and to all intents and purposes whatsoever, removed. Any-
thing to the contrary thereof notwithstanding.

CONCLUSION.

Thus we have concluded the history of this reign, the
brevity of which is to be attributed to the uniform course of
arbitrary power adopted by James II., with reference to the
municipal institutions of the country, and the directness and
undisguised nature of the means to which he resorted. Nor
is it necessary to add any further observations, but a repe-

* Hume, vol. viii. 178.

tition of the remark before made, that from the close of the reign of Charles II., the progress of usurpation and abuse was progressive and uninterrupted. James II.

WILLIAM AND MARY.

The anxiety for repose, which manifested itself after the disturbances in the reign of Charles I., and the successive usurpations of the House of Commons and Cromwell, followed also the violent inroads upon the constitution, which had been attempted by James II. 1689
to
1702.

Hence a disposition to terminate the doubts and uncertainties, which the unsettled state of the government and the country produced, drove the two contending parties into that coalition, which brought the Prince of Orange to England.

The same feeling had a strong tendency to render the commencement of this reign, comparatively speaking, tranquil, and to oppose a barrier to change or innovation of any description. Thus, rather than run the risk of discussion, or the peril of mooted new suggestions, many of the mischiefs prevalent during the reigns of the Stuarts, were left unremedied; and the greater part of the influential people of the country, were rather disposed to leave things as they were, than incur the peril of change for the purpose of improvement.

The king's disposition, prudent, cautious, and calculating, led him to the same course; and therefore in this reign, few strong and decisive steps of any kind, which refer to our inquiry, are to be met with—none that are public; and the few which occur of a private character, will be introduced in the general history of the reign.

It is only in the gradual confirmation of those abuses, which had been increasing from the time of Henry VIII., and

William and Mary.

were brought to rapid maturity by the Stuarts, that we are to look for the serious mischiefs to the constitution, which were effected in this reign; and those progressive steps are chiefly to be discovered in the legislative and parliamentary proceedings of the period, particularly those of the House of Commons.

The king himself did few acts to affect these questions. Charters. He granted the smallest number of charters of any of his predecessors, from the time of King John. They did not, as appears from the Patent Rolls, at the Rolls Chapel, exceed 14 in number, as shown by the following list with their dates.

List of Charters enrolled at the Rolls Chapel, during the reign of King William and Queen Mary.

1. 1690 2 W. & M. *Fowey.*
2. 1692 4 W. & M. *London.*
3. *Ludlow.*
4. *Nottingham.*
5. *Plympton.*
6. *Warwick.**
7. 1693 5 W. & M. *Colchester.*
8. 1694 6 W. & M. *Dunwich.*
9. 1696 8 W. & M. *Malmsbury.†*
10. 1697 9 W. & M. *Eye.*
11. *Hereford.*
12. 1698 10 W. & M. *Rumsey.*
13. *Tewkesbury.*
14. 1699 11 W. & M. *Deal.*

* Warwick, which had previously received charters from Henry VIII., Philip and Mary, Elizabeth, Charles II., and William III. in the fifth year of this reign, obtained another, commencing with a recital, that it had been accustomed to have two burgesses, in every Parliament, as other ancient boroughs within the kingdom: and that the inhabitants had been by previous charters a body corporate:—whereupon the king then incorporates the borough in the usual manner, by the name of “the mayor, aldermen, and burgesses, &c.” confiding the government to one mayor, 12 aldermen, 12 assistant burgesses, a recorder, and town clerk; the county justices are empowered to enter the borough as usual, but not otherwise to interpose. And the charter closes after confirming their previous liberties, with a clause that they should not be prosecuted by any writ of quo warranto for any cause then committed.

† See before, p. 1565.

The first public act was the declaration of the Prince of Orange, detailing the evils to be complained of in the government of James II. The principal topics were, the alteration of religion—the dispensing power—the tampering with the judges—the ecclesiastical commission—the case of Magdalen college—the orders for the examinations of the lords-lieutenants, deputy-lieutenants, and justices of the peace, relative to the test and penal laws ; and particularly (as referring to the present subject of inquiry) grievous complaint was made that the evil counsellors of the king had invaded the privileges, and seized on the charters of most of the towns that had a right to be represented in Parliament, securing *surrenders* to be made of them, by which the magistrates delivered up all their rights and privileges to be disposed of at the pleasure of these evil counsellors, who placed new magistrates in those towns, in whom they could most entirely confide.

William
and Mary.

1688.

Seizure of
Charters.

Surrender.

The other parts of the declaration are immaterial, excepting the remedy which is provided for all these evils in calling a new Parliament, attributing many of the previous mischiefs to the *interference* with the elections of members, and the Parliament itself. And that contrary to the charters and privileges of the boroughs sending members to Parliament, they had ordered such regulations to be made as would assure them of all the members to be chosen by the corporations. The declaration further adds, that although according to the constitution of the English government, and immemorial custom, all the elections of Parliament men ought to be made with an entire liberty, without any sort of force, as the requiring the electors to choose such persons as should be named to them ; and that the intention of the coming of the Prince of Orange was to have a free and lawful Parliament, assembled as soon as possible : in order to which all *the late charters, by which the elections of burgesses are limited contrary to the ancient custom, should be considered null and of no force.* And all magistrates who had been unjustly turned out should forthwith resume their

William
and Mary.

1688.

former employments ; as well as all the boroughs, should return again to their ancient prescriptions and charters ; and more particularly that those of the city of London, should again be in force :—that the writs should be directed to the proper officers, according to law and custom ; and that none should be suffered to choose, or be chosen members, but such as were qualified by law.

Thus it is obvious, that the obtaining a free Parliament was the great object held out to the country : and the means of doing it, was, according to the proclamation of James II., the restoration of the ancient charters ; and the annulling those that restrained the right of election, which was assumed to have been the object of seizing the charters.

The king next called together the knights, citizens, and burgesses, who had served in Parliament during the reign of Charles II., together with the lord mayor and court of aldermen for the city of London ; and they met at St. James', from whence they went to the House of Commons, and Mr. Henry Powle, the member for Windsor, to whose election for that place, we have before particularly referred,* took the chair, and the members assembled there resolved, that the Prince of Orange should be desired to take upon himself the administration of public affairs, both civil and military. And that he should cause letters to be written subscribed by himself, to the lords spiritual and temporal, being Protestants, and to the several counties, universities, cities, boroughs, and Cinque Ports, for calling a convention. And an address to this effect was drawn up and presented by the chairman, Mr. Powle.

Conven-
tion.

The letters issued by the convention Parliament, contained a clause which was not in the resolutions of the House, nor in the address to the Prince of Orange ; “ *that the elections should be made by such persons only, as according to the ancient laws and customs, of right, ought to choose members for Parliament.*” And the direction of the letters was “ to the chief magistrate, or such others who had right to make

* Vide ante, p. 134.

“return of members, according to the ancient usage, before
 “the seizure or surrender of charters, made in the time of ^{William and Mary.}
 “Charles II.” 1688.

Upon the meeting of the Parliament, the Earl of Wiltshire rose, and putting the House in mind that the first business to be done was to choose their speaker, added that there was an honourable person in his eye, whom he conceived well experienced, and qualified for that place. And he proposed the right honourable Henry Powle, who being approved of, by a general call was conducted to the chair, and the mace was called for, and placed upon the table, and the officers of the House chosen.

The returns of the different members were called over, and it is but justice to the prince, to say, that in confirmation of the observation we have before made, respecting his abstinence from interference, that there is no reason to believe, that he, either directly or indirectly, interposed in the elections; but that it was in the main, as he described it—“a free representative of the nation.”

This is confirmed, as well as the state of representation during the last reign, from the observations of Sir Henry Capel, in the debate on filling up the vacancies of the House, in which he said—“This assembly had been chosen
 “with freedom; and that there had not been a better election a great while, without force of the lord lieutenants.”*

Amongst the heads of those things which were reported by Sir George Treby as essential for the security of the liberties of the country, was the right and freedom of electing members for the House of Commons—and that the towns corporate, and boroughs, should be secured against informations of quo warranto, surrenders, and mandates, and restored to their ancient rights.

The difficulties which arose in settling the new government—always incident to such a state of things—and the impossibility of finding terms applicable to the position of the country, or which could reconcile the course then taken with right and law, are beside our present inquiry.

* 5 Cobbett, P. H.

William
and Mary.

1688.

Before the proceedings of the House of Commons were sanctioned by the act which is usually considered the first statute of this reign; the double returns were adjusted, and some petitions* against the elections were presented.

POOLE.

The first place respecting which any report was made was *Poole*, which also preceded the statute above referred to.

We have before seen the erasures which had been made in the books of Poole. And the last parliamentary decision in the reign of James II., relative to Thetford, treated the "common council" and "commonalty" as synonymous.

1688.
Common-
alty.

In 1688, the word "commonalty," is interlined in an entry in the books of Poole.

Upon the occasion of the present inquiry, it appeared from the report of the committee, that two members were returned by one certificate—and two by another.

It was proved, that Sir Nathaniel Napper, one of the members in the first, had agreed to settle 15*l.* per annum on the town, for their school, and he was at the charge of passing the new charter before the prince's arrival; to which it was answered by the counsel on the other side, that what was done by Sir Nathaniel, was about the time that he was made free of the town;† and that it was usual to give presents to the town, when any person was made free. "And that Mr. Trenchard and Mr. Chafin (two of the other candidates), when they were made freemen, gave 50*l.* a-piece to the use of the town for their freedom."

Fine. This is a strong instance of the abuses arising from the "making" of freemen, and of the perversion of the *fine* which was anciently paid as a contribution to the *common stock* of the town, to the modern purposes of direct or indirect bribery.

The question, in effect, was, who were the burgesses? or whether the right of election was in the mayor and burgesses

* Some of these were by the *inhabitants* or *commons*, as Southwark, Thetford, &c.
† 10 Journ. 24.

only; or, in the mayor, burgesses, and *commonalty*, who paid *scot and lot*. William
and Mary.
1688.

But it appeared to the committee, by many parliamentary decisions, that the right of election had anciently been in the mayor and *burgesses only*; except a return in the 18th of James I., when the "*commonalty*" are mentioned with the mayor, aldermen, and burgesses. But it was said to be sealed by the common seal of the "mayor, aldermen, and burgesses."

Sir Nathaniel Napper had 23 burgesses, and Mr. Chafin but 22; but of the *commonalty*, he had the decided majority.

The committee resolved, *that the right was in the mayor, burgesses, and commonalty, paying scot and lot*; and seated Mr. Chafin. Right.

The House after debate, negatived these resolutions; which cannot but be considered a strong measure in the House, as the committee had had an opportunity of seeing the documents, and hearing the evidence produced before them; particularly considering, that the election committee at that time was composed of some of the most considerable men of that day*—constitutional lawyers, as well as statesmen;—who both then, and for some years before, had been engaged in investigating the principles of our constitution, and particularly that of Parliament.

This negative vote of the House, will also appear the more extraordinary, if the documents stated before are considered. It is therefore probably to be explained by some secret intrigue of that day, which may have been exerted in favour of Sir Nathaniel Napper; who, it appears from the Journals, had interest enough to procure a new charter for the borough; and was soon afterwards appointed upon the committee of the bill for removing disputes concerning the assembling of the Parliament.

Thus in the first instance, when a right of election came before the House of Commons; although the evidence was

* Sir Richard Onslow, Sir George Treby, Colonel Sidney, Mr. Windham, Sir Robert Sawyer, Mr. Pollexfen, Mr. Godolphin, Mr. Denzil Onslow, Mr. Sommers, Mr. Hampden, Major Wildman, Mr. St. John, Mr. Harbord, and many others of considerable importance.

William
and Mary.

strong in favour of the "commonalty" paying scot and lot; and the committee decided in their favour; yet the House negatived that right.

The effect of this decision seems to have been apparent shortly after; for the next return assumes to be made by the *incorporated body*: emphatically so describing themselves, as if the determination of the House had been understood to give the right of election to the corporation.

1686. In the seventh of William and Mary, the return was by the mayor, senior bailiff, aldermen, burgesses, and commonalty, *incorporated*; and stated, that the mayor, aldermen, burgesses, and commonalty had elected—the mayor, aldermen and burgesses affix the common seal; the mayor signs it, and 26 persons subscribe themselves as witnesses—to four of whose names is added "*a burgess*."

Remarks. This strange introduction of the word "*incorporated*" for the first time, and the cautious addition of the word "*burgess*" after the four names, which does not appear to have been introduced before, shows how strong the disposition at that time was to support the corporate right of election. The attacks upon corporations during the reigns of Charles II. and James II., had probably raised the estimation of the people for their corporate rights; and Dr. Brady's book, insisting upon their emanation from the crown, had probably rendered them palatable to the king.

Common-
alty. It is said, that, after 1695, the word "*commonalty*" was omitted; and that, subsequently to that time, the inhabitants did not vote.

1688. On the 13th of February,* the Houses of Lords and Commons met in the Banqueting House at Whitehall, and tendered the crown to King William III. and Queen Mary; and they were proclaimed accordingly at Westminster and in the city. And on the 18th, the king went to the House of Peers, to which the Commons were summoned; and he addressed both the Houses of Parliament.

On the next day, the bill for removing all disputes concerning the assembling and sitting of Parliament was sent

* 10 Journ. p. 25.

down by the Lords to the House of Commons.* It was read a first time, and appointed to be read a second time the next day, which was done accordingly; when, after a resolution by a committee of the whole House, that the Lords, spiritual and temporal, and the Commons, then sitting at Westminster, were the two Houses of Parliament; the bill was read a second time, and committed:—Sir Robert Napper being one of the committee appointed.

William
and Mary.
1688.

It soon afterwards passed into a law, and forms the first chapter of the statutes in this reign, and imposed new oaths of allegiance and supremacy.

In the next year, the Bill of Rights was passed, by which the dispensing power of the crown was complained of, and declared illegal. The violation of the freedom of elections, particularly by letters to the boroughs as to the choice of their members, were likewise subjects of complaint; and it was declared elections ought to be free.

1689.

WALLINGFORD.

By a decision upon the right of election, the burgesses of *Wallingford* were determined to be “the inhabitants paying scot and lot.”†

DUNWICH.

A few days afterwards, the case of *Dunwich* was heard,‡ the principal question being, whether the right was confined to the burgesses inhabiting, or was in the freemen who lived out of the borough, commonly called “out-sitters:” a term obviously of modern invention. In other respects, this description of the two classes appears to be correct, and to correspond with the ancient law; for those inhabiting within the borough are properly called “burgesses,” because they *dwelt* in the borough; the others also are properly called free men, because they might originally have been freemen of that place by birth, servitude, or marriage; and being once of free condition, they would always remain freemen, whether

Dwelt.

* 8 Journ. 31.

† 10 Journ. 31.

‡ See before, p. 123. and 10 Journ. 36.

William and Mary. they lived within the place or not; but if they left the borough, they would have ceased to be *burgesses*.

1689.

The evidence, as stated in the Journals, was strong, to establish the right of the *burgesses inhabiting* within the borough, for the returns in the seventh and twelfth of Edward IV. are expressly described as made by them; to which it was only answered, that those returns were about the time that the statute passed requiring "all persons elected to be *resident* within the boroughs:" which seems rather a reason for inferring that the return was made with precise attention to the law and practice at that time, than to warrant any conclusion in disparagement of the effect of those returns.

The evidence offered on the other side were returns in the reigns of Henry VIII., Edward VI., Queen Elizabeth, James I., and King Charles II., which, supposing them to be contrary to those in the reign of Edward IV., ought not to have superseded them, because they were prior in date.

But in fact, they were not inconsistent with them, for they only described the election to have been made by the "burgesses and commonalty," that is, by their specific name of "burgesses," and the general name of "commonalty," for the whole aggregate body. At all events, there is nothing in the term "*commonalty*" to import "*non-residence*," more than in any other term. And it would be very extraordinary, if the term "*commonalty of Dunwich, in Suffolk*," should be descriptive of persons residing in Exeter, or any other place in the kingdom.

From the course of the evidence it seems, that some facts were proved, which were applied directly to the conduct of the candidates at the election, who were said, in the first instance, to have been disposed to take the votes of all the freemen, resident or non-resident, till they found that the *number of the "out-sitters overbalanced their voices,"* and then they polled only the burgesses inhabitants—evidence *ad hominem*—which is, generally speaking, too prevalent before all tribunals, and which certainly ought not to have had any effect in the decision upon the right of election. However, the committee resolved, "that the freemen out-

"sitters, as well as the *freemen* inhabiting within the bo-
 "rough, had the right of election," and the House agreed
 with that finding; seating Sir Robert Rich and Sir Philip
 Shippon, to the exclusion of Sir Roger North and Sir Thomas
 Allen.

William
 and Mary.
 1689.

Sir Peter Rich was one of the election committee. Mr. North and Sir Thomas Allen, against whom the decision was given, do not appear to have taken any part with the influential party in the House at that time: and would not be at the charge of bringing up their witnesses; they produced but one return; and it is added "so they lost it."* It must be remembered that, as it appears there was a majority of *non-resident freemen* above the *inhabitant* burgesses, this decision as effectually destroyed the rights of the inhabitants of the place, as if it had been effected by any of the means adopted by Charles II. or James II.

Non-
 residents.

The committee seem to have entertained some idea of what they were effecting, as well as of the difficulty of maintaining, that persons living out of the borough could be burgesses of it; because they do not in their determination, preserve the distinction marked at the beginning of the report between "burgesses inhabiting," and the "freemen out-sitters," but they abandon the word "*burgess*," which is the proper appellation by the common law, and the writs and precepts; and adopt the more general term of "*freemen*," which is in truth only a qualification for a burgess.

Thus amongst many others, were the real character and description of the *municipal burgesses* thrown into confusion by the hasty or partial decisions of committees of the House of Commons.

The error once commenced, was speedily propagated.

Three years afterwards, upon the election of Dunwich coming again before a committee, the term "*burgess*" was dropped altogether, and it *was agreed* on both sides, that the question was, whether the right was "in the freemen resident only, or in the freemen generally, whether resident or out-sitters."†

1691.
 Burgess.

* 11 Journ. 442.

† 10 Journ. 577.

William and Mary. For Mr. Bence, who insisted on the exclusive right of the
 1691. residents, it was insisted, that Dunwich was a borough by pre-
 Residents. scription ; which was undoubtedly true, as we have seen that
 the borough and its burgesses are mentioned in Domesday.*

Returns. A return in the seventh of Edward IV., was given in evidence, by which the two bailiffs, in the presence of the two coroners, and ten others named in the return, and many other *burgesses* and *resiants*, elected.

Another of the 12th of Edward IV., was by the bailiffs, with the assent of the whole commonalty.

The 30th of Elizabeth, the bailiffs, burgesses, and *commonalty* elected.

In the first of James I., and the first of Charles I., the bailiffs, burgesses, and honest men elected.

And by an ancient book it appeared, that in the 11th of James I., such of the 12—24—and freemen as were present, in all making 34, elected a burgess.

And in the 15th of Charles I., the election was the same, excepting that the numbers were less. During the Commonwealth, and upon the Restoration, and afterwards, the elections were made by still smaller numbers.

However, it must be remembered, that notwithstanding the decisive proof of the existence and interference of the select bodies of 12 and 24, (no doubt the grand and petit juries of the court leet) no one pretended that the right was confined to them, but it was allowed on all hands, that it
 Burgesses. was in the *burgesses at large*, whoever they might be.

Parol evidence was also given as to recent elections, in the course of which it appeared, that since 1670, 500 freemen had been made, whereof two were Scotchmen, and others lived very remote:—and particularly 42 were made free at an ale-house;—whereas there were not above 40 residents.

John.

The charter of King John was produced, which was incorrectly stated to be a charter of incorporation—but as it granted a “*gildam mercatoriam*,” that fact was insisted upon by the counsel, according to the doctrine of Brady, to be the ancient method of creating a corporation.

* Vide ante, p. 281.

The opposing candidate, Mr. Heveningham, insisted that Dunwich was a corporation by prescription, contending, that as the word "confirm"—as well as "grant," was contained in the charter of John, it implied that the burgesses were incorporated before that time; that all the ancient returns were under the common seal; and that in the ancient books it appeared, that elections to Parliament were always made at their corporation assemblies.

William
and Mary.
1691.
Prescription.

Here we find the whole doctrine of corporations expressly avowed for the first time, and that at the period when Dr. Brady's book was published.

The argument upon the word "confirm" is in every point of view unfounded. The word itself, as used in that charter, does not apply to the confirmation of prior privileges, but to the prior grant under the privy seal, which was confirmed by the letters patent, after proof of payment of the fine for the charter, by the production of the "oblata roll."

Confirm.

But even if it did confirm former rights, it would not be a confirmation of an incorporation, but of former immunities, resembling those contained in that charter: which, notwithstanding the assumption in the argument of its being an incorporation, was undoubtedly not of that description.

Immunities.

Nor could these facts, in any respect affect the question, whether the *residents* or *non-residents* had the right: because Henry III., a short time before the grant to Dunwich by King John, gave a charter to Wallingford, with a merchant guild, and confirming a charter of Henry II.; and yet we have recently seen that the burgesses of Wallingford, "were the inhabitants paying scot and lot."

Non-residents.

Guild.

The fact of the returns being under the "common seal," do not prove that they were corporate acts; and besides the many other circumstances to which we have before referred, to negative that fact, there is this decisive proof with respect to Dunwich, that it returned members to Parliament, from the 26th of Edward I., the earliest period, long before any municipal corporation existed in England.

Common seal.

Therefore, the returns having been as stated at corpo-

Corporate meetings.

William and Mary. rate assemblies, in fact, proves nothing; for as the elections would occur at uncertain periods, special meetings must have been appointed for the purpose, and wherever any place had been incorporated, those assemblies would, after the incorporation, be characterised by that name; although the original elections must have been at other meetings.

1691. Out-sitters. Parol evidence was also given on the same side of recent elections, at which "out-sitters" had voted. And singular testimony was adduced with respect to the supposed right of the "out-sitters,"—that the "inhabitants were not able to bear the public charge of the town:"—which might be a reason for their not sending members to Parliament, but none for the out-sitters voting.

1688. The determination of 1688 was read, and the committee properly resolved, in direct contradiction to the former resolution, according to the evidence, "that the right was not in the freemen, commonly called 'out-sitters,' as well as in the freemen inhabiting within the borough; but was in the *freemen inhabiting only*."

And the House agreed with both these resolutions.

Thus the right of the real *burgesses* was once more restored.

1695. The election for Dunwich came again before a committee in the seventh of William III.,* when much of the evidence, both documentary and parol, which had been laid before the committee on the former occasion, was repeated.

The petitioners contending that the right was "in the freemen inhabiting," and the sitting member, that it was in the "out-sitters."

The case was, like many others, involved in much obscurity, by the confusion arising from confounding the *Burgesses*, "burgesses" and "freemen" together. And in the course of the evidence, it appeared that the freemen, who had been made in the extraordinary manner before referred to, had some of them been sworn at *Yarmouth, Ipswich, &c.* and that many of them had never seen the town.

The former decisions were read on the one side and the

other: and the question appears to have been treated, strange as it may appear, (considering the sound determination of the committee reported in Glanville, in the Chippenham case,) as turning upon whether a charter of James I., which though it had been accepted, was said to have been surrendered, ought to have prevailed; or whether a charter of the sixth of William and Mary, which had been granted after that surrender, but had never been enrolled nor accepted, should regulate the election. The question being strangely supposed to depend, upon whether the freemen under the one charter or the other, had the right to vote:—and the number of freemen would be more or less, according as the one or the other was supported.

William
and Mary.
1695.

Charters.

1694.

Surrender.

As to the surrender, it was stated that it was not enrolled until the time of James II.: and the question was, whether the enrolment in his time did make good the surrender in King Charles's. And if it was good, then the charter of King James being accepted by the town, and no surrender of it being made, the petitioners insisted that the charter of William and Mary was void, and that it was never accepted.

Enrolled.

The sitting member, on the contrary, contended that the surrender was void, for that the king cannot take but by matter of record—that not being enrolled in King Charles's time, that king could not take by that surrender—and consequently King James could not. And that the *right of the burgesses could not be surrendered*.

With respect to the grant of the charter of William III., it appeared that in 1693, the freemen heard there was a petition for another charter. Upon which a hall was called, and *every freeman in the town* was there. That one Girling said, he signed the petition for fear "of being pressed." Others said, they did not understand it, but supposed it to be a petition for a scire facias or quo warranto.

Petitions.

There were 16 in the hall who were against any new charter—and nine that adhered to the petition they had signed. And accordingly one was framed against it—but finding the first was for restitution, they were desirous of

William obtaining another, but being unable to raise the amount of
and Mary. costs, 33*l.*, it was dismissed.

1694. In June, 1694, they carried King William's charter down
New with 3 or 400 *foreigners*, but the town never accepted it.
Charter.

Many of the voters were objected to, upon grounds connected with the rules and law of corporations; as that they were not free—that they had been disfranchised—that they had lived out of the borough—that they were in dependent situations, as apprentices, servants, living with their parents, &c.—that some were made free under King James's charter, and some under King William's.

Right. The committee finally resolved (contrary to the last determination), that the right was “in the freemen, commonly called ‘*out-sitters*,’ as well as in the *freemen inhabiting*.”

1708. The question was again agitated in the seventh year of the reign of Queen Anne, and the two former decisions in favour of the out-sitters were set aside, and the right re-

Right. stored to the real burgesses—by being decided, that it was “*only in the freemen inhabiting*.” An amendment was proposed to be made, by omitting the word “*only*,” but it was negatived. So that it is distinctly evident, that the intention was to exclude all but the *inhabitants*.

It is true, we have before seen, in the reigns of Charles II. and James II., that the right of the “non-residents”—as the most effectual mode of destroying the privileges of the real burgesses of the borough—was supported; however that was in periods when nothing better could be expected. But after the Revolution, and when the constitution was supposed to have been restored, particularly with reference to the re-establishment of municipal rights, it was not to be expected, that the “non-residents” of Dunwich should have been supported in their usurpation; particularly when the evidence, as well as reason and principle, were so decisive against their claim,—and when there was an intervening decision excluding them. It was however, left to a future day to correct the errors of the convention Parliament.

Non- It is singular, that shortly after the first resolution was
residents. made, supporting the right of the “non-residents” in Dun-

wich, that the House of Commons appeared fully aware of the mischief which had been produced by the encroachments upon the rights and privileges of the boroughs, and therefore upon a report from the grand committee of grievances, the House resolved, "that a bill should be brought in to restore all bodies politic and corporate to the state and condition they were in before the restoration in 1660;" and which in truth if it could have been effected, would have corrected a great part, though not the whole of the abuses that had been introduced. William and Mary
1660.

But the error in this resolution, as well as in many of the proceedings of that time, was, that the question of the municipal and parliamentary rights of the boroughs was considered as depending on their *corporate* rights—a position which has been shown by history, principle and precedent to be untenable; and to involve the greatest constitutional anomalies. Corporate rights.

DEVIZES.

The election of *Devizes*, in the same year, was submitted to the consideration of the committee of privileges* in the convention Parliament: the question being, whether the mayor and burgesses, as a select number, had the right of election, or all the free burgesses?—as if there could be any doubt, that the election ought to be by the *burgesses*, as the writ and precept required. 1688.

The petitioners' counsel insisted, that it was a "borough by prescription;" of which there is distinct evidence by the charter in the reign of Henry II.† But it was truly stated, that it was not a corporation by prescription; which there is sufficient general evidence to establish.

It was contended for the *petitioner*, that all the *burgesses* had a right to elect: and they produced a charter of the 15th of Edward III. to the "*burgesses* and their successors," and a return of the second of Henry V., of burgesses chosen by the "*commonalty* of the borough." Burgesses.
Common-
alty.

* 10 Journ. 56.

† See before, pp. 157, 322, 410.

William
and Mary.
1688.

Another of the first of Queen Mary, by the mayor, "for himself and the *commonalty* of the borough."

And another in the 31st of Charles II., by the "mayor and *burgesses*."

A witness, upon his cross-examination stated, that he had known many elections, but that none was by the "*popularity*" but one, about eight years before.

Sitting
members.

For the *sitting members*, it was insisted, that it was a *corporation by prescription*, and that the right of election was in the mayor and *burgesses* as a *select number*; and they produced returns of the reigns of Queen Elizabeth, James I., and Charles I., and also the charter of James I.,* referring to the recital "that the mayor and *burgesses* time out of mind, had "enjoyed divers liberties," &c., and therefore it was insisted that it was a corporation by *prescription*. But upon that circumstance, and the inference to be drawn from it, we have already remarked.

Prescription.

It was further proved, that the election by the "*burgesses* in general," had taken place a few years before, and had been allowed by the mayor, after he had received a bond of indemnity from the candidate. The committee decided, that the right was "in the *select number* of the *burgesses* only," and the House agreed in that determination.

Right.

Thus the error founded upon the introduction of the corporate doctrines, and upon the mistaken assumption of the existence of *corporations by prescription*, led the committee of the convention Parliament to make this, their first resolution, in favour of the right of the *select body*, which was followed shortly after by others of a similar description.

Much confusion was no doubt introduced into all these questions, by the supposition that the privileges and liberties of the boroughs differed from each other: raising questions as to the anomalous and contradictory *usages* in different places; which could never have occurred, had the facts referred to in the progress of our inquiry been borne in mind, establishing that all the boroughs were created for the same

Usages.

* See before, p. 1493.

purpose—and had charters in substance similar, though varying slightly in expression.

William
and Mary.

1688.

KNARESBOROUGH.

The next place which came under the consideration of the committee was *Knareborough* :* which affords a striking illustration of the observation just made.

There is no ground for supposing that it was an ancient borough. It is not mentioned in Domesday ; and it never returned members to Parliament until the reign of Queen Mary.

In the 17th of Charles I., it is stated, that Sir William Constable was returned, a baronet of great esteem and integrity, by many able men of the borough. 1641.

But one William Deerlove, a son-in-law of Benson, who had been previously expelled from the House, and who was described as a man of very mean, or of no fortune or condition, was returned by his younger brother, whom he had appointed his deputy or bailiff ; and on that ground his return was made void.

The next time the election for this place came in question, was before the committee of the convention Parliament. 1688.

The bailiff had made a double return, against which there was a petition, and in the report, the voters are described as the *boroughmen* ; a term which was also used in the evidence in the Dunwich case, though the right was finally fixed in the freemen. Sir Thomas Fawkes was stated to have the majority of the *ancient votes*, who had been *sworn in court* and *returned*. Which probably meant, that they had been entered in the court and paid their reliefs for their borough houses, according to the custom of the borough. The *ancient votes* were admitted on all hands to be good : the new votes lately transferred were disputed. Lord Latimer, the other candidate, died ; and there being no petition from the borough, and Mr. Fawkes having had 25 of the old votes, and Lord Latimer only 19—Mr. Fawkes was elected. Boroughmen.

From this report it appears, that there must have been a

* 10 Journ. 57.

William
and Mary.

1668.
Leet.

Court
baron.

court leet* and a court baron within the borough: for the ancient votes which were admitted to be good votes, are stated to have been sworn in court, and to have paid their reliefs. The former act would have been done in the court leet, for the court baron has no power of administering such an oath; and the latter was no part of the functions of a court leet, but the peculiar province of the court baron:—the effect of these two combined qualifications, as describing the *inhabitant householders*,† will be pointed out in the observations upon the right *agreed* in the next year. It being remembered, that as Lord Latimer had died, there was no decision against what were called the new votes; which no doubt were for houses built on lands, newly separated from the ancient burgages.

1690. In the next year, the right of election was *agreed* to be in the *burgage holders*; and if that agreement meant the whole of the *inhabitant householders*, it was accurate. Coupling it with the report in the former year, there is every reason to think that it did; for, from the statements as to the voters, contained in that report, it is clear, that the being a burgage holder was not sufficient to give them the right of voting, because they are stated to have been also *sworn*; nor would it seem on the other hand, that the swearing alone, unless they were also *holders* of burgage houses, was sufficient. The result therefore is, as the common law required, and as stated in Glanville, describing the common law right, that they must have been *inhabitant householders resiant*; for the combination of those qualifications could alone make them subject to be *sworn* at the *leet*, and to pay a relief for their houses, was the necessary consequence of their being *householders*. Whatever the modern doctrine may be as to the burgage holders, there can be no doubt but that originally all the houses in a borough were held by burgage tenure; and therefore this description in fact includes all the *inhabitant householders*.

* And in the first of George I., 1715, it appears from a petition, that the bailiff of the borough was charged with having without authority, empannelled a jury of 30 burgesses. This proceeding must also have been at the court leet, for there is no jury at the court baron.

† See also, Newport, Cornwall.

Such would be the constitutional explanation to be given of the evidence, and the determination in the case of Knare-
borough. William
and Mary.

But the striking circumstance to be marked with respect to this place is, that although it clearly is a modern borough, the right of election was put upon the ground of the "ancient votes:"—but in the case of Devizes, which was undoubtedly a borough by prescription, and had always returned members to Parliament, from the earliest times, the right was declared to be in the "select body," who must have been of modern creation.

EAST GRINSTEAD.

The next case of *East Grinstead* affords the strongest proof of the manner in which these questions were disposed of by the House of Commons.* 1688.

Mr. Conyers petitioned against Sir Thomas Dyke. The question was, whether the burgage holders alone—or the *in-* Inhabitants *habitants* as well as the burgage holders—had the right of election.

For the *petitioner* the following decisive evidence was given Petitioner. to show that the right was in the *inhabitants*.

A return of the first of Queen Mary, "by the bailiff, burgesses, and all other inhabitants."

Another in the 14th, 30th, and 21st James I., by "the bailiff, burgesses, and *inhabitants*, of their common assent jointly together."

Another in the first of Charles I., by the "bailiff and others of the commonalty."

Another in the 15th of Charles I., by "Thomas Dine and others, burgage holders, and Edward Newington and others, "*inhabitants*."

In the 16th Charles I., "burgenses et alii *inhabitantes* elegerunt."

The decision before given in 1640 and 1679, in which the votes of the *inhabitants* were supported, was also read in evidence. And proof was adduced that the election had

* 10 Journ. 66.

William and Mary. been by the "*inhabitants*," as well as by the "burgage holders," in Charles II.'s time.

1688.
Sitting member.
Burgesses. For the sitting member, Sir Thomas Dyke, who had the majority of the burgage holders, returns of the 12th of Edward IV., by the "*burgesses*;" in the 17th of Edward IV., by the "bailiff and *commonalty*;" in the 28th of Elizabeth, by the "*burgesses and inhabitants*;" in the 15th of Charles I.; 13th, 27th, 29th, and 30th of Charles II., by the "bailiff and *burgesses*."

Evidence was also given of elections by the burgage holders, and some objections were made to the votes of Mr. Conyers, that two or three of them lived in one house, and that they did not all pay to the *church and poor*; but they were not supported by evidence.

Usage. "Upon the whole matter, the committee finding, both by
"records and witnesses, that the *usage* for the election of
"the borough hath been for the most part by the *inhabitants*
"at large, as well as the *burgesses*, the committee resolved:
Right. "That the burgage holders alone within the borough, had
"not the right of electing members to Parliament.

"That the *inhabitants* as well as the burgage holders, have
"a right to vote for members to Parliament."

Upon these rights being reported to the House, strange to say, they negatived them; for which it is difficult to account, unless it is to be attributed to any party or political feeling at the time, which is not improbable, as in a subsequent inquiry a few years afterwards, it appeared, in the course of evidence, that Sir Thomas Dyke had been charged at the election with being a jacobite, and keeping a jesuit in his house.

1695. In the seventh of William and Mary, the election of East Grinstead again came before a committee upon petitions from the candidates, and also from the *burgesses and inhabitants*.

Petitioners. The petitioners insisted upon the right of the *inhabitants* and burgage holders paying *scot and lot*. To prove their right, the same returns were given in evidence which had been used for that purpose before, as well as those of the

12th and 17th of Edward IV., adduced on the former occasion *against* the right of the inhabitants. And there was also added a return of Edward VI. by the "burgesses and inhabitants." William and Mary.

Inhabitants

It appeared in evidence, that it was doubtful when some of the deeds had been executed: from which it is probable that the usual abuses, connected with the burgage tenure right of voting, had been practised.

On the part of the sitting member it was proved, that many imputations against them, and threats against the town, had been made during the progress of the election. Sitting member.

The committee decided, that the right was not "in the burgage holders and inhabitants: but in the burgage holders only." Right.

From a petition in 1708 it appears, that the burgage tenure right of voting having been thus established, the fruits of it were soon visible, by double voices being given for one and "the same burgage hold." 1708.

And in 1803, the abuses had reached to such an extent, that a petition was presented, and an investigation continued for a considerable time, founded upon the objection of "occasionality" to the votes.* It appearing in evidence that none of the voters had ever paid any quit rents for their burgages—nor the land-tax—and that the houses were assessed in the names of the persons from whom the titles were derived—and who were also at the expence of maintaining and repairing the buildings. No consideration was paid for the deeds, but the grantees, when they accepted the conveyances, signed a declaration of trust as trustees for the grantor. None of the voters had possession of their deeds; but they were brought in a bag to the place of election, by the agents of the grantors, and carried back by them in the same manner. 1803.

Occasionality.

Thus was a decision of the House of Commons, in contradiction to the evidence, and the report of the committee who had patiently heard it, the foundation of such abuses of the municipal and parliamentary rights of a borough, and

* 1 Peck. 307.

William and Mary. presenting so extraordinary a disparagement of our constitution.
1688.

MARLBOROUGH.

The next case,* of *Marlborough*, affords, in the argument for the petitioners, an apt comment upon the decision for Devizes in favour of the select body :—the question being, whether the election ought to be by the mayor and a *select number* of burgesses, or by the *populacy paying scot and lot* ; or, properly speaking, whether the *inhabitants* were the *burgesses*.

Petitioners It was contended by the *petitioners*, that of *common right*
Inhabitants it was vested in the *inhabitants*, and that the mayor and select number could not *prescribe*, because, until the reign of Henry IV., no mayor had existed in that borough.

Returns were also produced, by the petitioner, of the 28th of Edward I., “ *pro burgo* ;” 33d Edward I., “ *pro communitate burgi de Marlborough* ;” sixth Edward II., “ *pro burgo* ;” and likewise the charter of the 18th of Elizabeth.†

Sitting members. The sitting members insisted, that the “ mayor and *select number* of burgesses” had the right. And produced indentures of the ninth of Henry IV., 36th of Henry VIII., seventh Edward VI., first and second of Mary, all appearing to be made under the common seal of the “ mayor and *burgesses*.”

The town clerk gave evidence that he had never heard, from 1636 to 1679, of any popular election, though at the latter period such a right had been set up ; but two persons had then testified, one for 60, and the *other for 40 years*, that they had never known any election by the populacy, and that the *free burgesses* enjoyed privileges above the *inhabitants*, as being toll free, and possessing a close of 80 acres ; and the committee found by the records and witnesses, that the usage of the right of election had been by the *mayor and select number of burgesses* ; and it was therefore resolved, that the right “ was in the mayor and *select number* of burgesses.”

The committee in this case, instead of ascertaining who

* 10 Journ. 70.

† See before, p. 1220.

were the *burgesses* in the 28th of Edward I., appear to have relied upon the parol testimony of the town clerk, which extended, at the farthest, to 60 years: and he was, in one respect, inaccurate in his statement, when he said, "he had known the borough from 1636 to 1679, and had never heard of the rights of the *inhabitants* being set up, except in the year 1679;" it distinctly appearing that, in 1641 and 1680, the *inhabitants* insisted on their rights.

William
and Mary.
1688.

With respect to the interval of 60 years, there had been the long Parliament, and only six returns, at two of which, in 1679 and 1680, as well as this of 1689, the *inhabitants* had petitioned; and, in 1641, had pursued a similar course.

It therefore appears, that at four of these elections the *inhabitants* insisted on their rights: and if they did not at the other periods, it should be remembered they were in the reign of Charles II., when that king was making encroachments upon the municipal institutions, in favour of the select bodies.

As to the "free *burgesses* being toll free," that privilege was granted to the "*burgesses* of Marlborough" by the earliest charters, and the absurdity has been already pointed out of supposing that such exemptions could have been granted to any *select part* of the "*inhabitant householders*:" and in fact, the exercise of this privilege is enjoyed at the present moment by *inhabitant householders*, though not of the select body.

It does not appear upon what grounds the committee were justified in stating, "that from records and witnesses the usage of election had been by the 'mayor and select number,'" except, perhaps, that they erroneously conceived the returns being under the common seal of the "mayor and *burgesses*," and the evidence of the town clerk, were sufficient authorities for making that assertion.

ANDOVER.

An inquiry as to the election for *Andover*, also immediately succeeds that of *Marlborough*, and we have already seen, the right was likewise decided to be "in the

William
and Mary.

1688.

"*select number only.*"* The circumstances connected with the evidence of the exercise of the right by the "populacy," and the threats of the town clerk, to prevent them from asserting their rights, will be in the recollection of the reader.

SALISBURY.

The next case which occurs is *New Sarum*.† In which the right was also determined to be in the *select number*; but which cannot be a ground of surprise, considering the disposition of the committee, to adopt that right as the petitioners did not appear, and the proceeding was *ex parte*.

The question was, whether the right was "in the select number," or "the *citizens* in general."

The sitting members, who seemed to have availed themselves of the absence of the opposing party, asserted that New Sarum was a *corporation time immemorial*—an extraordinary assertion, considering that it had no existence as a borough, or municipal institution of any kind, until after the removal of the see from Old Sarum; and the first charter granted to it was in the 11th year Henry III., which was confirmed by another in the 34th of Edward I.

There was therefore no ground for this assertion, upon which the rest of the case depended.

The recitals from the charter of sixth Charles I.,‡ and the ninth James I., were also read: but they are subject to the observations before made, with respect to similar recitals of Queen Elizabeth:

They produced also, returns under the common seal, which for the reasons before adduced, proved nothing.

An ancient book of the corporation, stated elections in the 31st, 33rd, and 39th Henry VI., to be by the mayor, 24 and 48; and the same in first Edward VI.; and 30th Henry VIII.

The resolution in 1640, was also given in evidence, and

* Vide ante, p. 1392.

† 10 Journ. 71.

‡ See before, p. 1494. There was also a confirmation in the 27th Chas. II., of all the former grants to the citizens and inhabitants.

an extract from another borough book, to show that the persons then returned, were elected by the corporation; which seems to proceed upon the assumption, that the 24 and 48 formed the corporation; whereas it existed of those persons, *and the commonalty besides*, the latter being generally an indefinite, and more numerous body. But it is a circumstance to be remarked, with respect to this place,* and *Truro* also, that the *commonalty or body at large of the burgesses have been altogether superseded by the select body; no such class now exists in either of those places.*

William
and Mary.
1688.

Parol evidence was also given of recent elections, and the committee resolved, "that the right was in the select number," to which the House agreed. Right.

And in the next year, upon a petition, the right was agreed by the parties, no doubt in consequence of this decision, to be in the "mayor, recorder, aldermen, and "common councilmen."

It then appeared in evidence, that five had been sworn after publishing the precept for the election; but upon the ground that they had been elected some time before—that others had been sworn as long after their election—and that no objection was taken at the time of their swearing—the committee allowed the votes to stand. But the reader will perceive that *abuses of that description were one of the consequences which followed every species of corporate right of election*: and that such consequences must ever ensue, unless the right of burgess-ship, and every privilege connected with it, is made to depend upon other circumstances than the mere exercise of a particular right. Occasionality will ever be an accompaniment of such proceedings, *unless rights and duties are, as correlatives, united together*, and the exercise of the right is only made one of the consequences of a pre-existing qualification.

CRICKLADE.

The description of the burgesses of *Cricklade* is still more extraordinary than any we have seen before.† In determining

1688.

* See also post. temp. Queen Anne.

† 10 Journ. 82.

William
and Mary.

the right of election for this place, the *burgesses* were by *agreement* declared to be "the freeholders and copyholders of the borough houses, and leaseholders for any term not under three years:"—which varies in some slight degree from the agreement as to the right in the reign of James II. But the comments then made are sufficient to point out the weight that is due to such an agreement, and the anomalous nature of the terms of it.

1685.

The rest of the case turned upon the conduct of the election, and is immaterial to our inquiry.

RYE.

1688. As to *Rye*, the question was, whether the right was in the freemen who were *resident* in the town only—or in the non-resident freemen also.*

The inquiry was involved in one of the questions resulting from the corporate right of election, viz., whether the freemen had been made by *lawful mayors*; and they were objected to upon supposed defects in the titles of the mayors: another instance of the difficulty connected with that species of right of voting.

A person who had been town clerk for many years stated, that there were no instances from the time of Henry VI., of any *foreign freemen*† appearing at the election. That all were sworn to pay *scot and lot*, which was always understood to mean the bearing part of the charge of the franchises; but he never knew *foreigners* to pay towards the charge of the parish. That he *never remembered any foreign freemen, till the act for regulating corporations, give any vote*, unless they had been members of Parliament a year before. That he never knew any foreign freemen serve at any coronation as barons, from the time of Henry VI. till the coronation of Charles II., and then only one. That for the eleven years he was town-clerk, there was never a

* 10 Journ. 8.

† As "foreigners" are universally excluded by all the statutes, charters, law cases, bye-laws, and municipal documents from all participation in the privileges of every borough—the term "*foreign*" freemen seems clearly to point out that their introduction was a usurpation.

farthing paid by any foreign freeman towards the charge of a bailiff to Yarmouth, or wharfage; though he apprehended if they were scotted, they ought to pay; but he never knew them scotted.

William
and Mary.
1668.

They also produced in evidence the act of brotherhood before quoted,* stating, that none but resident freemen should vote.

Much evidence was then given as to the persons who were entitled to be mayor, and also respecting a contested election for that office—as well as the proceedings upon a mandamus, which had been obtained for the restoration of one mayor; the other, who had in the mean time been in office, having made many freemen, who were “said to have been disallowed by the rest of the corporation.”

On another occasion it appeared, that the king in council had turned out a mayor elect, and placed another person as mayor in the office, who also made four other freemen.

For the *sitting member* it was insisted, that the *foreign* freemen had a right to vote as well as the *resiants*; and it was not material whether they were made by a mayor de facto or de jure. Some evidence was given that foreign freemen had been allowed to vote; and, that at the election of mayor, some had voted who were expunged men, having been turned out by the regulators of the corporation.

Sitting
member.

Sir Dennis Ashburnham said he was a foreign freeman, and had been so ever since the commission of 1662; had since given his vote several times for mayor, but had never voted before for burgesses to Parliament.

They also produced a bye-law of 1661, by the mayor, jurats, and commonalty of Rye, by which it was resolved, that a “freeman, by dwelling out of the franchises, should “not lose his freedom.”

Non-resi-
dence.

But it should be remembered, that this was a resolution of that particular corporation, which could not alter its constitution, and give the non-residents a right, if they did not possess it by law. And we have before shown the principles upon which the non-residents could not have that right.

* See before, p. 533, et seq.

William
and Mary.

Neither could such a bye-law alter the class of persons who were entitled to be freemen of the Cinque Ports, which were to be regulated by the orders of the brotherhood or Ghestling. "Ghestling,"—in the Journals, described as of the nature of a Parliament of the Cinque Ports. The order of that body, mentioned before, was seven years after this order for Rye, and would therefore, at all events, have superseded it. It was also given in evidence, on this occasion, that none but freemen could carry the canopy at the coronation; and that several who were non-residents, had been chosen to serve for that purpose; and non-residents had attended at the assemblies, and given their votes, but they could not say they had done so for parliament men. The oath of a freeman, by which they swear to pay *scot* and *lot*, was also read.

Oath. The committee resolved, that the right was "in the freemen
Right. "who were *resiant* in the town only;" and the House agreed with that resolution.

Some important points are discoverable from this case: first, the inconveniences resulting from the right of election depending upon the modern doctrines as to corporations. Next that the freemen of Rye, one of the Cinque Ports, continued their ancient liability to pay *scot* and *lot*; which is properly described as "the individual's contribution to the charges of the town:"—certainly more accurate than the definition of Lord Glenbervie, who confines it to the payment of the church and poor rates.*

Scot and
lot.

Another point to which we have before referred, is here also distinctly established, that the *foreign freemen* were introduced immediately after the Restoration, under the statute of the 13th of Charles II., for the regulation of corporations. The effect of which statute is also explained in the evidence relative to the expunged men. It will likewise be observed, that other precedents for the introduction of non-resident freemen, were borrowed from the admission of persons who had been previously members for the borough. Another important consideration—applicable to all other places, but

Foreign
freemen.

* See post., the statute for regulating the elections for London.—11 Geo. I., ch. 18, 1724.

more particularly apparent in this,—is, that the question, *who should vote for members to Parliament?* is in fact the same William and Mary. as, who are the *burgesses* of the borough.

But in this place, as well as in many others, the absurd expedient was resorted to, of supposing that there could be burgesses who were entitled to vote in corporate, and not in parliamentary elections.

It has been repeatedly shown, that of freemen there might be residents and non-residents—also freemen belonging to the corporation generally: and freemen admitted only for the purpose of licensing them to trade in the place. But of *burgesses* there could be but one class, the *free inhabitants* of the borough. Freemen. Burgesses.

In passing, we should observe, that leave was given in this same year,* to bring in a bill for repealing the statute of Henry V., which required members returned to Parliament, to be burgesses, *resiant and free*, of the boroughs for which they were returned. But it does not appear to have proceeded any farther, and the act remained unrepealed, as pointed out before, until the 14th year of George III., 1774.†

WINDSOR.

Upon the extraordinary decision relative to *Windsor*—that the right was in the “*select body*”—we have already commented in the early part of this work.‡

That this decision was contrary to the former determination—that it was subsequently set aside, and that the person seated under it was Mr. Powle, who was one of the individuals who applied to the Prince of Orange to come to England; and the individual who took the chair when some of the members assembled upon the Prince's arrival in London, will be in the recollection of the reader. And it seems somewhat singular, that there should be a distinct report which retained the seat for Mr. Powle, on the 2nd of May, and a separate report as to the other seat, on the

* 10 Journ. 86. † See stat. 14 Geo. III., ch. 58, repealing 1 Hen. V. ch. 1.

‡ 10 Journ. 106. See before, p. 133, et seq.

William
and Mary.

14th, when the election of Sir Christopher Wren was declared to be void. And Sir Algernon May being also decided not to be duly elected, a new writ was ordered.

LYME.

1689. The borough of *Lyme*, in Dorsetshire, was brought into discussion before the committee of privileges this year,* but the report affords little further information, than that by a confusion of the corporate and freehold right of voting, with reference to the payment of *scot* and *lot*, the whole was left in such a state of uncertainty, that it would be impossible to collect from it who were the real burgesses of the borough.

Other inaccuracies also appear in the report; as that *Lyme* was made a borough and corporation by Edward I.; and that they were coeval; for which purpose the charter is quoted, granting that it should be a *free borough*; and that the *men*† should be free burgesses; and that they should have a merchant guild:—but that such a grant did not make them a corporation, has been abundantly proved.

Many returns were given in evidence by the mayor and *burgesses*, who were the proper persons to make them.

It appears that the act for the regulation of corporations, had been followed by the same effects in *Lyme*, as at *Rye*; and Sir John Strode and Colonel Bishop had been called by the mayor to his assistance; and they had afterwards voted in the common council house, for mayors and other officers. They seem to have introduced the custom of "*out-burgesses*"

* 10 Journ. 140.

† Grants to the "*men*" of the different boroughs have been so frequently quoted in this work, that it is thought desirable to add a reference to the several pages in which they occur:—see pp. 85, 86, 99, 100, 118, 122, 124, 137, 139, 144, 174, 187, 191, 217, 250, 300, 304, 306, 307, 319, 328. Scotland—335, 336, 337, 338, 346, 353, 354, 355, 358, 359, 372, 378, 380, 382, 391, 404, 409, 414, 415, 430, 438, 454, 465, 467, 468, 469, 470, 473, 481, 484, 506, 508, 515, 516, 518, 519, 521, 526, 529, 545, 546, 567, 580, 590, 593, 598, 617, 628, 630, 640, 641, 645, 650, 651, 662, 664, 665, 667, 673, 699, 747, 750, 753, 760, 775, 778, 789, 791, 796, 799, 800, 833, note, 853, 854, 858, 883, 886, 896, 919, 941, 946, 963, 967, 974, 998, 1000, 1003, 1005, 1006, 1013, 1036, 1075, 1085, 1113, 1119, 1130, 1131, 1151, 1198, 1327, note, 1335, 1392, 1393, 1435, 1436, 1490, 1553, 1557, 1558, 1590, 1615, 1618, 1662, 1665, 1668, 1708, 1740, 1876.

into the place ; as there were five other "*out-burgesses*" ex-
cepted to. William
and Mary.
1689.

An effort was also made to set up the rights of the "freeholders," but no particular ground was stated for it. If they were "resident householders," they were certainly entitled to be burgesses ; but if they were non-resident freeholders, they were as clearly not entitled. And it appears to have been assumed, that the "freeholders" were confined to "residents ;" because it was said that there were no instances of freeholders out of the town voting.

A *surrender* of the charter was also given in evidence ; and Surrender.
much confusion seems to have arisen as to the freemen who were entitled under the old, or under the new charter. And "*honorary freemen*," the most objectionable class of voters, were also referred to.

Nothing further appears from the report, excepting that the committee determined in favour of the petitioner, Sir William Drake, against the sitting member, Mr. Burr ridge. But the House, as we have seen in some former instances, took upon themselves to decide against the committee, and supported the seat of Mr. Burr ridge.

TRURO.

The next case which occurred is that of *Truro*.

We have before mentioned some of the peculiar circumstances of this borough, and particularly noted the early returns by the *commonalty*, and that a court leet was continued there in the reign of Queen Elizabeth. Common-
alty.

There was also a return by the "mayor and commonalty," Returns.
in the reign of Queen Mary ; as well as one before quoted, in the reign of Edward VI.,† and the return added that they "of one mind, assent and consent, elected the members ;" and the seals of the parties were affixed to the indenture.

The court leet also continued in existence till the period Court leet.
1690.
of which we are now speaking, and in the full exercise of those functions with respect to the *resiants*, which we have

* 10 Journ. 141.

† See before, p. 1325.

William
and Mary.

1690.
Inmates.

traced from our earliest laws. And we find that the jury in Truro, in this year, presented persons as "inmates," with a view to prevent their being *settled* there: establishing the connexion before pointed out, between the ancient common law, and the modern law of settlement. Some of the persons presented appeared in the court, and according to the ancient practice, were *sworn* to abide by the law, and were thereupon *admitted* and *enrolled* as townsmen.

1691.

Leet.

Suitors.

In the same manner, in the succeeding year, the jury presented, according to the articles of the *leet*, "all who ought to have done suit, and had made default:" and parties were summoned, to show cause why they should not be *removed* from their habitations within the borough.

1699.
Present-
ments.

A few years afterwards, the jury presented a man, his wife, and family, as "*inmates*:" and all persons who did not appear to do suit.

Corpora-
tion.

They also presented irregularities in the swearing of the mayor and magistrates, which they stated to be encroachments upon their rights, and declared to be void; showing clearly that the ancient borough rights and jurisdiction exercised in the court leet, were paramount to any rights belonging to the corporation: or to speak with more precision, we ought to say that, in this case at least, the borough municipal government continued in its ancient state, the corporate powers having been superinduced upon it, merely for the purpose of making it conformable to the modern doctrine of corporations; giving it a perpetual succession, and a corporate name, under which it might take and grant—sue and be sued—and do other acts as a corporate body.

"The twenty-four" having been mentioned before, with respect both to this place and others, and it having been suggested that they were the juries, we ought to add, that it appears from the entries in the records of Truro, that the *grand jury* of that place always consisted of 24. And the aldermen are entered as "*presented*, elected, and affirmed, by the *jury* at the court leet, according to the charter, and ancient privileges of the borough:"—and, it might be added, according to the ancient law of the land: the aldermen being,

as in the cases of London, Norwich, and Calne, the ancient conservators of the peace; and, therefore, presented and elected like the constables at the *court leet*. William and Mary.

There is an entry of two persons being *continued* as aldermen, according to the charters and ancient privileges. 1689.

The jury also present all persons that entertain *strangers* to *dwell* and *sojourn* with them, and do not give notice thereof to the mayor within one month after they receive them, according to the common law; as in Bracton, and according to the *usage* in Leicester.* Strangers.

Inmates are also presented for opening shops within the borough without the license of the mayor; and also a person for entertaining an inmate as a reputed shopman, without the consent of the mayor; and others as pedlars and petty chapmen opening shop windows; and two *as reputed Scotchmen having wandered into this realm of England*. Inmates.

There is another entry in strict conformity with the common law, by which all *freemen* and others that ought to appear at the court and make default, are presented: where it is obvious that the word "freemen" could only mean those who, as the "*liberi homines*," were bound to be *sworn*, and *enrolled* at the *court leet*. Freemen.

Considering the previous history of Truro and the facts we have just detailed, showing the continual existence of the *court leet*, and the matters which were presented at it by the *jury*, the following decision, that the right of election was "in the select number;" or, to reduce those expressions into constitutional language, that the select number of mayor, aldermen, and capital burgesses were the *whole body of the burgesses*, or the *commonalty*—is a contradiction in terms, and a palpable absurdity.

There was a double return on the Prince of Orange's letter, against which there was a petition, which was heard before the committee of privileges, and the question was, whether the right was in the *populace* or the *select number*. 1688.
1689.

The petitioners, Mr. Tredenham and Mr. Manley, claimed by the *populace*.

* See before, p. 235, et seq.

William and Mary. The sitting members, Sir H. Ashurst and Henry Vincent, by the select body.

1689. For the petitioners it was said, that Truro was a *borough by prescription*, and that it was *incorporated by Queen Elizabeth*.*

Returns from the 26th of Edward I., sixth of Edward II., and tenth of Henry IV., were given in evidence, and that of the seventh of Edward VI. appeared to be made by the mayor with the consent of the *whole commonalty*.

Common- The return of the first of Mary was as stated above.

Sitting member. For the *sitting member*, it was said, that Truro was a *corporation by prescription*, as well as a borough (with what truth we have shown before); and that this was imported by the recital of the charter of Elizabeth, upon which we have already commented.

Returns. They also gave in evidence, the return of the 26th Elizabeth, by the mayor and *burgesses*, under the seal of the borough.

Burgesses. But it must be observed, that a return by the mayor and *burgesses* proved nothing on this point, unless it was by the mayor and *capital burgesses*; and the omission of the term "capital," used in the charter, was on the contrary, strong to show that the term "*burgesses*" used in that return, did not mean the capital burgesses, but the burgesses generally. They also gave in evidence an ancient book, in the time of Henry VII., mentioning the *twenty-four*, (who, as observed before, were probably the grand jury at the court leet)—and they produced a return of the seventh of Edward IV., and the 30th of Queen Elizabeth. Also a lease of the 33rd of Henry VIII., and a grant of the third of Edward VI., as well as the resolutions of 1660 and 1661. And they asserted a *usage* for the mayor and 24 to elect, ever since the 31st of Queen Elizabeth; which at best, could only show the practice to have arisen out of that charter; which could not, according to the Chippenham case, affect the right of election existing from the reign of Edward I.

The committee however resolved, that the right was in the mayor and *select number of burgesses only*.

* See before, p. 1325.

As to this resolution, it may be observed, that the question was between the *populace* and the 24—the decision being, that it was in “the *select number of burgesses only*”—not expressly mentioning the 24. So that it was neither expressly inconsistent with the exclusion of the *freemen* by the former resolutions, nor of the *populace* by this, that the right should have been still in the *select number of burgesses, who did suit and service, and were enrolled in the court leet*.

William
and Mary.

1689.

Such persons were the ancient voters—distinguished as well on the one hand, from the *inhabitants at large* who in no place had the right; as on the other, from the *non-resident trading freemen*, or freeholders, who had as little pretence for their claim.

And in that sense, and that only, could this election be reconciled with the former, or with the general law.

There were afterwards other petitions as to the mayor, denying his title to that office in one instance; and in another objecting to his conduct; but no further petition as to the right of election occurred.

It is a curious custom, said to exist at Truro, and which seems to refer to the right of the *householders*; that upon the election of mayor, the town mace must by custom be delivered to the lord of the manor, until 6*d.* is paid for every *house* in the town, consisting of 400.

House-
holders.

HEREFORD.

In this year, an election petition complained that many persons were *secretly* and unduly *sworn*, and made free, in ale-houses, &c., and in no way qualified for their *freedom*.

1689.

In the heads which were reported to the House for the indemnity bill,* amongst others was inserted the opinion of the committee, that the advising and procuring the *surrendering* of charters—the alteration and subversion of corporations—the violating the rights and freedom of elections to Parliament by declaration or informations, were crimes for

* 10 Journ. 148.

William
and Mary.

• which persons might justly be excepted out of the bill of indemnity.

CALNE.

1689. From a petition in this year,* it appears that a quo warranto was filed in the reign of James II., against the borough of *Calne*; and that a new charter was granted, which turned out the old burgesses, and brought in new ones; and that the person who obtained it made himself steward, or head burgess, though he lived at the Crown-office—and the petitioner stated, that the court being informed that he was a disaffected person, the Chief Justice Jefferies being enraged with him, had him sentenced to stand in the pillory before Westminster Hall—at Calne, before his tenants and neighbours—and also at Salisbury—to be fined 1000*l.*—to be imprisoned till it was paid—and to give security for his good behaviour during life: which was executed upon him accordingly, he being confined three years in the King's Bench, to his ruin.

The petition concluded with a request that he might have a sum of money for the distresses and privations he had suffered, out of “ those plentiful estates that the late Lord “ Jeffreys and Browne had got by regulating corporations.”

PLYMOUTH.

1689. The borough of *Plymouth* affords another striking instance of the disposition of the committee of privileges in the convention Parliament, to exclude the claims of the burgesses at large—which was called the common law right of election—and to give a preference to any other exclusive class of burgesses.

Plymouth was said, upon this occasion, to be a borough by prescription; it might have been, and probably was so—but it is not mentioned in Domesday. Its ancient name was Sutton, under which it returned members, from the 26th of Edward I., with some intermissions, till it was incorporated under its present name in the reign of Henry VI.†

* 10 Journ. 164.

† See before, pp. 801, 870, 1097, 1401.

On the Restoration, the question being, whether the mayor, ^{William and Mary.} 12 aldermen, and 24 burgesses — or the mayor and *commonalty*, had the right of election; it was decided to be in the latter. 1660.

On the present occasion,* the petitioner insisted upon the right of the “freeholders and freemen.” 1689.

The sitting member on the right of the “freeholders” only—and he was confirmed in his seat.

But in 1740, the decision in this respect was corrected 1740. in practice, and the freemen were allowed to vote: but that committee made the right exclusive, by adding the word “only:” and the term “freemen,” being understood to relate to corporate freemen, all the evils of “non-resident and honorary freemen,” were introduced and continued till the late alteration. ^{Freemen. Non-residents.}

By means of this decision, and also of a mandamus, which was tried in Exeter, the freeholders were altogether excluded.

SOUTHAMPTON.

Southampton, in some respects, obtained a better fate than other places in this Parliament, though it still had one of the great evils resulting from the corporation act entailed upon it, by allowing *non-residents* to be called, and to act as *in-burgesses*. In the Journal,† they are strangely called, resident burgesses. ^{Non-residents.}

In the second year of William III., the certificate of the return of the members was made by the mayor and sheriff. 1689.

Sir Charles Windham petitioned against the return, claiming to have been elected by the *burgesses and inhabitants*. ^{Inhabitants}

Mr. Fleming, the sitting member, claimed to have been chosen by the mayor, bailiffs, and *select number of burgesses* of the corporation. ^{Burgesses.}

Several returns were given in evidence, and many witnesses called to show the *scot and lot* men had voted. ^{Scot and lot.}

For the sitting member it was contended (but erroneously), that Southampton was a corporation time out of mind: the

* 10 Journ. 320.

† Ibid.

- William and Mary. 1689. having a merchant guild being mistakenly treated as evidence that there was an incorporation of the burgesses. In fact the members of the guild and the burgesses were two distinct and separate classes, as we have frequently pointed out. The right was determined to be "in the *burgesses and inhabitants*."
1695. In the sixth of King William III., there was another petition :*— the petitioner insisting that the *out-living burgesses* had no right to vote: the sitting member the contrary.
- Petitioner. It was given in evidence for the *petitioner*, that though out-living burgesses had been polled, they were marked to be tried upon any question in Parliament.
- Sitting member. For the *sitting member*, many witnesses were called to prove, that out-burgesses had voted for members of Parliament as well as mayors.
- Right. And it was resolved, that "the *out-living burgesses* had a "right to vote."

CORPORATION BILL.

- Corporations. The bill for the restoration of corporations to their ancient privileges, which had been for a long time pending before the House of Commons,† was read for a third time on the 1689. 10th of January, in the first year of King William and Queen Mary.

The proceedings upon this bill are curious, as exhibiting the extent to which party feelings and prejudices are calculated to drive the strongest minds. And with that view—as well as for the purpose of showing the extremes into which the arguments were driven, and to prove in how unsatisfactory a state the municipal and parliamentary rights were placed, by being connected with the modern doctrine of corporations, some history of the proceedings, and short extracts from the debate, which was long and violent, may be excused.

Smollett says, "that the Whigs brought in the bill, aware "that their strength at the elections consisted in the corporations."

On the former stages of the bill the attendance in the

* 11 Journ. 518.

† See 10 Journ. 105, 112, 233, 204, 322, 325.

House had been thin, and no accounts are given of the debate.* William
and Mary.

1689.

Mr. Sacheverell said, that the surrenders of charters were notorious crimes—he spoke of the times in which it was done as wicked; some men, through their poverty surrendered, as they could not withstand. He urged that after the city charter was taken away, it might have induced the majority to surrender.

Sir Walter Younge spoke of the villainies of the surrenders.

Sir Christopher Musgrove appealed to the knowledge of the House, that whole books had been stolen away by the town clerks.

Lord Falkland spoke of the rights which had been restored by the circular letters of the Prince of Orange.

Serjeant Maynard (a great constitutional lawyer) said, “*If those surrenders stood, they may make what Parliament men they will at court.*”

Sir Henry Goodrich appears to have fairly summed up the causes of the surrenders in the words, “avarice, force, and easiness,” which induced the corporations to surrender their charters.

Sir Thomas Clarges stated that he knew a corporation of 600*l.* a-year, advised by this Lord Chief Justice, to surrender; or else, if judged against them, the lands would go to the next heir of the grantor.

Sir William Williams said, in some corporations of 600 who had a right to give consent to a surrender, not above 34 were for it, and they prevailed; and how came this about, *this was a packed common council by Lord Jeffries.* And, in Chester case, that there were 500 still in being in Chester against the surrender.

Mr. Hume, complaining of those who had made the surrenders, said, “those men have delivered up their charters, depriving of their right children unborn.” He added, “corporations did choose such as were for court purposes.”

Mr. Solicitor Somers said, “to destroy corporations, and to make Parliaments at the pleasure of the crown, this is the

* 5 Cobbett, Parl. Hist., 508.

William and Mary. thing—and three persons are complained of for it. This is the worst means to arrive at the worst ends imaginable; all those men that were in the first part of this matter, were either for private or worse ends.”

Mr. Foley said, it was endeavoured, in the two last reigns, to get a Parliament to subvert all our constitutions. There was a design for a clause in a bill that all corporations should surrender their charters by such a time, or else they should be void and the justices of the county should act in all towns, &c. Had that design succeeded, there would have been no need of quo warrantos. It was part of the king's declaration to restore all *corporations* to the condition they were in before the quo warranto informations and surrenders.

Mr. Finch (another constitutional lawyer), spoke of the surrenders as a fault, but said it was general, and attributed them to the judgment in the London quo warranto, after which most of them occurred. It appears also from his speech, that the preamble in the bill stated, that the design had been to pack Parliaments—and that there was a clause to declare all surrenders void.

Sir Robert Howard stated, that it was in times when the doctrine of divine right was upheld, that they began with corporations; that is, began to oppress and interfere with them.

This debate arose upon a clause which had been introduced for the expulsion from the corporations of those who had prevented the surrenders—the clause was rejected, and the bill passed.

Tindal gives an account of harsh clauses, which were introduced into the bill, as well as the further proceedings thereupon, particularly the protest in the House of Lords, in which were collected the cases, which when properly considered, show that *the incorporation is a matter totally distinct, both from the municipal rights and burgess-ship, as connected with local jurisdiction and police, and also with returning members to Parliament.*

As it is obvious from every principle, that a corporation which exists under the grant of the crown, accepted by

such a body, may be put an end to by the surrender of the grant by the grantees; and the acceptance of the surrender by the crown: so it is equally clear, that if the king should by his charter, create a borough for the public good, giving it *local jurisdiction*, and as a consequence that place should have returned members to Parliament, both of these being for the public good, could not be forfeited either by abuse, non-user* or surrender; so that, as in the cases of Taunton and others, the corporation might be destroyed, and the borough would continue its jurisdiction and its representation in Parliament.† By this view of them, the cases which were cited, may be reconciled and rendered intelligible:—without such an explanation, they appear irreconcilable, and a mass of confusion.

William
and Mary.

The session having ended, the bill proceeded no further, and the Parliament was afterwards dissolved.

Upon the assembling of the Parliament in the second year of King William and Queen Mary, the effects of the decisions of the convention Parliament, in favour of non-residents, became apparent.

1689.

Non-
residents.

A petition was presented from the borough of *Bridport*, complaining of the bailiff, for allowing persons, *not inhabitants*, to vote.‡ And a similar petition from *Aldborough*, in Suffolk, against persons brought in from the country, *not inhabitants*, nor paying *scot and lot*, but lately made free to the number of 25, contrary to the usage and custom of the borough. There was also a case at law, relative to the borough of Oxford, in which complaint was made, that foreigners had been unduly admitted to offices in the borough.

Bridport

Eyre, C.J. said "they could not choose out-setters, for by "charter they must choose of the *inhabitants*. But if the

* Where a court is established by the king's charter, for the public benefit, the words of permission used in the charter, are obligatory; and the right of determining suits cannot be lost by non-user. *Rex v. Mayor and Jurats of Hastings*. Hilary Term, 1822, 5 B. & A. 692; *Rex v. Steward, &c. of Havering, atte Bower*, *ib.* 691.

† See also as to the effect of a dissolution of a corporation, case of the King v. Corporation of London, *Skinner*, 310. See also, *Rex v. Amery*, and *Rex v. Monk*; 2 Term Rep. 515.

‡ 10 Journ. 352, 353.

William and Mary
1689. “usage of the place, hath been to choose ‘out-sitters’ since
“the charter, *though wrong*; yet it takes away the conspiracy
“charged by the information.”

O There were also complaints made, with respect to the
undue making of freemen, *after the teste of the writ in*
York.* And of the improper admission of freemen, at
Chester.† *Chester.*‡

It will be remembered, that in *Maldon* and *Dunwich* it was proved, that the honorary freemen out-numbered the inhabitants and freemen.‡

In all which cases, had the real point been kept in view, that the only question was, who were “the *burgesses* of the borough;” no reasonable doubt could for one moment have been entertained. Losing sight of that guide, committees of the House of Commons involved these inquiries in such endless distinctions and intricacies, that they at last became barely intelligible.

LUDLOW.

The methods by which the surrenders of old charters were obtained, and the effect of the new grants, may be seen by the following extract from the petition for *Ludlow*:§ which stated that the town was a borough by prescription, and incorporated in the first of Edward IV. That the Lord Chancellor Jefferies extorted a surrender from the town of all its powers of electing the officers, even to the *attornies* of the *town court*, which surrender was enrolled by the head bailiff of the town.

That King James II. incorporated the town by the name of “mayor, aldermen, and common councilmen;” but it had been previously incorporated by that of “bailiffs, burgesses, and commonalty”—with a reservation of the power of removing all the officers at pleasure, and confining the elections of members to Parliament, to a select|| number of 12 aldermen and 25 common councilmen, contrary to all

* 10 Journ. 417.

† 10 Journ. 491.

‡ 10 Journ. 40. Vide post. Plympton.

§ 10 Journ. 352.

|| This charter was afterwards declared void. 10 Journ. 522.

former custom—and that the late king, in order to restore the town to its ancient privileges, removed the mayor and all the other members and officers of this new corporation.

William
and Mary.
1689.

But a person assumed the mayorship, under the new charter, though dissolved, and by combination with the sheriff, having the precept directed to him, proceeded to an election by the new corporation men, and 28 *new burgesses*, made under the new charter, and returned his own brother-in-law as member. Notwithstanding the petitioner was chosen before the bailiffs, by a unanimous consent of voices, qualified under the old charter; and the bailiffs having made a return thereof to the sheriff, he took the same and tore it.

HASTINGS.

A petition from *Hastings*, also proves the interference with elections which was at that time continued, particularly in the Cinque Ports;* for it states that “the governor of Dover Castle claimed to have a power in the several Cinque Ports, and required them not to engage their votes for any particular person, *for that his majesty would recommend to them such persons as he should think convenient for them to choose*, and by menaces and threats, procured the voices of many electors.”

Cinque
Ports.

It has been asserted by Smollett and other authors, that William III. did not interfere with the election of members to Parliament, but this petition appears to give a denial to that assertion, and the interference with the Cinque Ports appears to have gone to such an extent, that a statute was passed expressly for the purpose of preventing it. It was entitled, “an act to declare the right and freedom of election of members to serve in Parliament for the Cinque Ports,” and commenced by reciting, that the election of members to serve in Parliament ought to be free; that the wardens of the Cinque Ports had claimed to have the right of nominating to each town of the Cinque Ports, one person, as baron, to represent them in Parliament. It was therefore enacted, that such nominations and recommendations were contrary to the

1690.
Cap. 7.

William
and Mary.

laws and constitutions of this realm, and for the future shall be deemed void to all intents, &c.

G

LONDON.

1690. Next after the above statute, follows an act for restoring the privileges and for reversing the judgment in the quo warranto against the city of London, and for restoring it to its ancient privileges. It recites the quo warranto, and declares the judgment to be null and void; and enacts that the mayor and *commonalty and citizens* should be a body corporate; and, strange to say, it is enacted, that they should *prescribe* to be a corporation.* In the recital, as well as the enacting clause, it shows the proper powers of a corporation, viz., to plead and be impleaded in their corporate name. All grants, but not leases, made after the judgment, are declared to be void—the officers in place at the time the judgment was given, are confirmed—the then present officers continuing until a new election. The companies and corporations of the city are also incorporated and restored to all their lands and privileges: as well as those who had been admitted into the freedoms or liberties of the companies.

Non-
residents.

In the next sessions of Parliament,† there is a statute for paving and cleansing the streets of the city of London and Westminster,‡ which with some others passed in this reign, may, as comments upon the introduction of non-resident voters in the election of members to Parliament, serve to satisfy the reader that on all other subjects, but those in which political feelings interfered, as in those elections, the legislature, and all other institutions in the country, according to the practical wisdom and experience of our ancestors, confined all rights and obligations to actual *residents* and *householders*.§

* It is impossible that London could, under any circumstances, prescribe to be a corporation, for had it been so before the time of legal memory, its liberties were seized in the reign of Henry III.; which being after that period, destroys the prescription. See before, p. 444.

† 2 W. and M. sess. 2, cap. 8.

‡ See also 8 & 9 Will. III., cap. 37.

§ See case as to residence in Oxford, 2 Vent. 106, City of Oxford's case. And as to the objection to *strangers* being elected into the offices of the city, 3 Lev. 293, Mayor of Oxford v. Wildgoose.

The statute to which we have referred, compels the persons *inhabiting* in and about London and Westminster, according to the common law as practised in the court leet, to cleanse the streets, &c., before their respective houses; and all the streets are to be paved and lighted at the expence of the *householders* and *inhabitants*; and the rates are directed to be paid by the *parishioners* and *inhabitants*, according to the usage and custom of the city.

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and Mary.
1690.

Sec. 15.

House-
holders.

The reasonable interpretation of the words "parishioners and inhabitants" would obviously be to apply them to those persons who were at that time *actually inhabitants* occupying houses; because, unless they had houses, they would not be rated: and those who had houses, which they might have left for some temporary purpose, without having removed to others in different parishes, in such a manner as to make them *Parishioners* there: which explanation is, in all respects, consistent with the proposition, that *inhabitaney* in a *borough* would, with the other legal qualifications, make a *burgess*.

Parishion-
ers.

In other parts of the statute, the ancient *inhabitants* usually present at the election of parish officers, are mentioned.

Inhabitants

Such *inhabitants* are to be called together, and they, or the greater number of them present, are to make a rate upon the *inhabitants*, (who could only be the *inhabitant householders*, and in practice they are so,) and which rates, if not paid, are to be levied by distress.

Sec. 10.

The warrants of distress are directed to be executed by the *constables* and *headboroughs*; that is, by the constables in places under the jurisdiction of the counties at large, and by the headboroughs in the boroughs, according to the ancient duties of those officers.

There is also an act* for an amendment of the laws for the

* See also 8 & 9 Will. III., c. 30, where, in the preamble, the parish, township, or place where the person lives is mentioned, which clearly applies to *actual inhabitants*; and reference is made to the *security* to be given upon any person coming to settle in any other place; which is in conformity with the common law, and supports the explanation we have before given as to the fines to be paid by new comers into the borough. The persons referred to in this statute are to be supported as *inhabitants* of the parish, and their settlement by *birth* and subsequent acquisition by settlement are both mentioned. See also 9 & 10 Will. III., c. 11, settlement by tenement of 10l.

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and Mary.

1690.

Notice.

settlement of the poor, which referring to the 40 days' *residence*, handed down to us from our earliest laws, requires that *notice* should be given to the overseers of the house of his abode, and the number of his family, which is to be registered. This appears to be a substitution for the *notice* required by the common law to be given to the tythingman, or headborough, by the hosts, of every stranger or guest who came to their houses.

The sixth section, in analogy to the common law, gives a permanent settlement, without notice, to any person who should come *to inhabit* in any town, and should, on his own account, execute any annual office or charge during *one whole year*; or should be charged with or pay share towards the public taxes or levies of the town or parish.

Scot
and lot.

House-
holders.

A more accurate definition of paying scot and bearing lot cannot be conceived, and from the terms used, it could only be applicable to *householders*; for such only would fill those offices or pay those levies.

Sons.

Appren-
tices.

The principle upon which this settlement is given without notice is obviously because the town must be understood as having notice of the person whom they had appointed an officer, and from whom they had received levies. Upon the same ground as the sons of freemen and apprentices had a right to claim to be recognized as of free condition, because the town must have notice of their being so, inasmuch as their fathers, in the one case, had been recorded as freemen; and in the other the apprentice would have been enrolled.

The registry required by this statute seems to be in analogy to the enrolment at the court-leet.

The eighth section of this act appears also to place the meaning of the word "*inhabit*," beyond all doubt. It directs that, if any person bound an apprentice by indenture should *inhabit* in any town or parish, such binding and inhabitation should be adjudged a good settlement. Here the terms "*inhabit*" and "*inhabitation*" cannot but mean actual residence, and have always been so interpreted.

The 11th section, speaking of the magistrates who are to regulate the persons to receive collections, describes them as

**William
and Mary.**

1690.

Cap. 12.

Inhabitants

Residence.

Boroughs.

Corporate towns.

1692.

Inhabitants

William and Mary. or other officers; and the warrants are to be directed to two, at least, of the most able and sufficient *inhabitants*.

1692. Dwelling. The persons to be assessed are those *dwelling* and *residing* within the limits of the places.

The collectors are to be persons *living* where they are chargeable.

Resident. Persons are to be rated for personal estate where they are *resident*.

Householders. And all those *not being householders*, nor having a *certain place of residence*, shall be taxed at the place where they shall be *resident* at the time of the execution of the act.

There are provisions for persons having property where they are not resident, and for persons having *several mansion houses*, or *places of residence*.

Inmates. *Householders* are to give an account of persons who lodge or *sojourn* in their houses.

No letters patent granted by their majesties, or their progenitors, to any persons, cities, boroughs, or towns corporate, of liberties or privileges, shall exempt the *inhabitants* from these rates. But no person *inhabiting* any city, borough, or town corporate, is to be compellable to be assessed out of the limits of the city, &c. This must necessarily be con-

Resident. fined to those actually resident.

Any person *inhabiting* within the city of London, or any other city or town corporate (boroughs are strangely omitted), having his *dwelling* in one of the parishes or wards, and Dwelling. having in another parish or ward goods chargeable, shall be rated where he *dwellleth*, and not elsewhere.

In the 54th section, which provides for the change of residence, "*inhabit*" and "*reside*" are used as synonymous terms.

The second chapter of the statutes for this year, is an act that the *inhabitants* of the province of York may dispose of their personal estates by will:* and it speaks of the custom of York with respect to persons *dying inhabitants* of that province; and the persons included within the statute are

* So also as to Wales, 7 & 8 Will. III. c. 38.

persons *inhabiting or residing* ; but it is not to extend to the ^{William and Mary.} *citizens* of York and Chester, who are *freemen* of those cities, ^{1692.} *inhabiting therein*, or within the suburbs thereof.

The form of the venire for juries, given by the statute, ^{1693.} 4 & 5 William and Mary, c. 24, requires, in the language of our earliest laws, that 12 free and lawful men (*liberos et legales homines de vicineto*, &c. should be summoned.* Saving nevertheless to all cities, boroughs, and towns corporate, their ancient usage of returning jurors.

Here the term "*liberos homines*," or *freemen*, must mean persons of *free condition* ; and it should be observed as to this writ, that the persons returned are always those who *reside* in the county, and yet there is nothing further to require their residence but the general expression *de vicineto*, an expression so common in many of the early charters.

A stamp is first imposed by 5 William and Mary, c. 21, ^{1694. Cap. 21. Stamps.} s. 2, upon *admissions* into any corporations or company.

The right of the inhabitants as *burgesses* to vote, was much less encroached upon in the Parliament which succeeded the Convention, than during that sessions.

Thus in the case of *Bedford*, the burgesses, freemen, and ^{Bedford. 1690.} inhabitants being householders, were treated as the burgesses, by being declared to have the right of election : but *sojourners* were excluded.†

The charter of Queen Elizabeth to the borough of *Plympton* ^{Plympton. 1690.} had been surrendered, and a new one granted by James II. It was declared to be void by the House of Commons, who appointed a day to consider the advisers and prosecutors of the charter of Plympton, and who passed it, as well as the surrender of the old charter.‡ In the next month, there was a petition from the freeholders, inhabitants, and burgesses, stating their early charters, and complaining that in the reign of Queen Elizabeth, by some

* So also 7 & 8 Will. III. c. 32.

† 10 Journ. 376.

‡ 10 Journ. 378, 397.

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and Mary.
1690.

undue means, a charter was procured to make the town a mayor town; since which, by making *foreigners freemen*,* the power of election and right of return had been usurped from the petitioners, and the charter had been surrendered to King James, and a new one procured, whereby a greater power was pretended in depriving the petitioners of their right. And it appears that the mayor, who lived three miles out of the borough—had unduly returned Sir George Treby, the attorney-general, the then late recorder of London; and Mr. Pollexfen with him.

LUDLOW.

A complaint was also made with respect to the proceedings relative to the surrender and grant of a new charter to *Ludlow*,† which was declared void. And great irregularities at the election appear to have taken place, in consequence of the manner in which the charters had been dealt with—the right both of the *select body* and *non-residents* being insisted upon—as well as the power of the “chamber,” as it was called, admitting and rejecting such persons as they thought fit.

THETFORD.

As to *Thetford*, although the right was taken to be in the “select body,” it was not by the decision of the House or the committee, but by the *agreement* of the parties.‡

ALDBOROUGH.

In *Aldborough*, in the county of York, the question was, whether the right was in the *select number* holding by *burgage tenure*, or in the *inhabitants paying scot and lot*;§ and the committee decided, that the right was not only in the select number holding by burgage tenure, but that “*all the inhabitants, paying scot and lot*, had the right;” with which the House agreed.

* Vide ante, Dunwich and Maldon.

† 10 Journ. 399.

‡ 10 Journ. 352, 428, 575.

§ 10 Journ. 418.

WINDSOR.

As to *Windsor*,* the right was again decided by the committee to be in the *select number*; but the House negatived that decision, and seated the candidates who relied on the votes of the *inhabitants paying scot and lot*. And as it would appear, properly, for many returns were given in evidence made by the "*commonalty*," and by the *burgesses* and *inhabitants*. 1690.

SANDWICH.

The right as to *Sandwich* was agreed to be in the freemen of the port *inhabiting* within it.†

CIRENCESTER.

And in *Cirencester* it was agreed to be in the *inhabitants*, to the exclusion of *inmates*.‡

DROITWICH.

The election for *Droitwich*, came before the committee of elections.§ However little can be collected from the report, for the right of election adopted by the committee is so peculiar, that it affords no precedent or principle, which would be applicable to any other borough.

The history of this place, which was anciently called "*Wyche*," is also very imperfect. It is said to have returned members to Parliament in the earliest times, but afterwards discontinued till the reign of Queen Mary, since which it returned members regularly. Wyche. 1554.

The question on this occasion was, whether the right was in the burgesses of the Salt Springs of Droitwich, or in the proprietors of the Salt Springs at large.

Very little evidence was given on the occasion. It however appeared, that several of the corporation had only a reversion upon a pepper-corn rent, reserved after the term of 500 years; and by the ancient rolls it was proved, that

* 10 Journ. 419.

† 10 Journ. 461.

‡ 10 Journ. 457.

§ Ib.

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and Mary.

1690.

Right.

many of the proprietors, were not burgesses of the corporation.

The committee resolved, "that the right was in the burgesses of the corporation of the Salt Springs of Droitwich,"—a strange definition of burgesses.

From the nature of the decision in this case, which expressly gives the right to the corporation, it is obvious for the reasons we have given before, that this could not, on that account, have been the ancient right of election in the time of Edward I.

COLCHESTER.

As to *Colchester*,* the right was agreed to be in the "*freemen*:"—or in other words—involving a species of contradiction—the "*freemen*" were declared to be the *burgesses*.

BUCKINGHAM.

Right.

In the case of *Buckingham*,† the right seems undoubtedly to have been determined by the committee, to be in the select body of "the bailiff and 12 burgesses:"—but there is nothing in the evidence, to justify such a decision; and it would be difficult now to say to what it can be attributed.

MARLOW.

As to *Marlow*,‡ both the contending parties insisted that the right was in the *inhabitants and householders*—but the sitting member contended it was only in those who paid *scot* and *lot*; in conformity with which both the committee and House decided.

SALISBURY.

In the case of *Salisbury*,§ the right was *agreed* to be in the select body of "mayor, recorder, aldermen, and common council;" but it was not decided by the committee or the House.

* 10 Journ. 466.

‡ 10 Journ. 478.

† Ib.

§ 10 Journ. 479.

CHESTER.

And, in the *Chester** case, on the other hand, it was taken for granted by the parties, that the right was in the *freemen*.

WAREHAM.

In *Wareham*† it was agreed the right was in the “inhabitants paying scot and lot, and the freeholders,” who were therefore strangely determined to be the burgesses.

DEVIZES.

In *Devizes*‡ the right was assumed to be in the “free burgesses,” which is a proper and legal name for the burgesses; but then the question is, who, properly speaking, they ought to be.

Till the end of December, in this sessions, we find that there was only one case in which the right of the select body was maintained, which was that of *Buckingham*. That decision took place upon the 11th of November, 1690—on the 29th of December, in the next year, the case of *Banbury* was heard.

The attention of the reader has been before drawn to both these cases,§ and the period at which Dr. Brady’s History of Boroughs was published. The reasons have also been pointed out in the observations on the charter to *Banbury*, in the reign of Queen Mary,|| and upon a comparison of that charter with the grant to *Abingdon*, the right never should have been directed to be in the *capital burgesses*, but in the *inhabitants*, as it was in *Abingdon*.

It is now only necessary, as far as relates to the decision respecting *Banbury*, to say, that the sole question on this occasion was, whether the right was in the mayor, aldermen, and capital burgesses—or the select body—or in the burgesses at large. It was said to arise from some doubtful words in the charter of Queen Mary, upon which we have

* 10 Journ. 492.

† 10 Journ. 520.

‡ 10 Journ.

§ See before, p. 111.

|| See before, p. 1201.

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and Mary.

1690.

already commented. But, amongst other things, the recital that the inhabitants had been of great service to the queen, is mentioned in the report. And, on the other hand, it was stated, that the capital burgesses were frequently spoken of in the charter, with reference to the vacancies in their bodies, the choice of the serjeants-at-mace, and in several other parts. After which, the profits of the markets and fairs were stated to be granted to the bailiff, aldermen, and *burgesses*; and in that clause, at all events, it is impossible that the term should have applied to any but the body at large—for there could be no pretence for saying that the markets and fairs were intended to be granted to the bailiff, aldermen, and capital burgesses.—It is obvious that they were intended to be granted to the inhabitants or burgesses at large, who were the objects of the bounty of the queen.

The report then goes on to say, that “the privilege of sending a burgess to Parliament was granted to the bailiff, aldermen, burgesses, and their successors—so that the word capital being left out of the grant, made the doubt upon the charter, whether the borough should choose in their corporate capacity by the select number, or the burgesses at large.”

Even this statement of the question seems to answer it, for why was it to be assumed that the word “capital” was omitted. The charter giving this power to the bailiff, aldermen, burgesses, and their successors, was sufficiently intelligible of itself, without assuming that there was any omission—they were the persons incorporated, and for whose benefit the grant was intended, and for whom the capital burgesses themselves were to act. If therefore, the word “capital” had been introduced into this clause, it might, considering the general scope, intent, and object of the charter, have been contended, that it was a mistake, and that the clause must have meant, that the burgesses at large should elect—for such a direction by the king would alone have been constitutional, and consistent with the common law.

But when in point of fact, the word “capital” was not in the clause, but the general term “burgesses,” which was con-

sistent with the common law—how it could for one moment have been contended that such a mode of expression could be charged with any omission, it is impossible to conceive.

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Still less can any good reason be found for the determination, when the evidence is considered.

Returns were produced by the petitioners of the fifth and 14th of Elizabeth, by the bailiff and *whole commonalty*. And the 28th and 30th of Elizabeth, by “the bailiff, aldermen, *burgesses and commonalty*.” In the 18th of Charles I. by “the mayor, aldermen, and burgesses.”

It is true, that in the 13th of Charles II., the return was expressly made by the “mayor, aldermen, and capital burgesses;” but it is clear, that although returns by the bailiff and whole commonalty, are absolutely destructive of the exclusive right of the capital burgesses, it by no means follows, that one return by the capital burgesses should exclude the right of the burgesses at large—because, though they had the right, they might not have exercised it. But besides this, supposing even that such would have been the effect of this evidence—could such a return in the year when the corporation act was passed, be for one moment received as satisfactory evidence upon the subject?

For the sitting member returns were produced of the 29th and 41st of Elizabeth, by the bailiff, aldermen, and *burgesses*—which in truth proved nothing for him, but rather the other way, as he produced another return in the 31st of Charles II., in which the mayor, aldermen, and *capital burgesses* elected, under that particular description.

Parol evidence was also given for the sitting member, that the elections had been by the capital burgesses; and the committee decided that the right was in the mayor, aldermen, and capital burgesses; to which the House assented.

Right.

It is impossible to account for this decision, excepting from the fact to which we have already adverted, of Dr. Brady's book having been published the year before.

That work probably produced a considerable effect at the time of its publication; and it was no doubt afterwards

William and Mary. quoted on many occasions as an authority;—probably the only instance in which a political pamphlet has been so used.

However, it has been so far relied upon, that it becomes indispensably necessary to show the nature of that publication.

BRADY'S HISTORY OF BOROUGHES.

Preface.
1691.

It scarcely seems necessary to attempt an answer to the general observations and surmises in the preface of that author; they will either be supported or fall to the ground, as the cases which he has cited subsequently in the work, either confirm or deny them: and as he himself appeals to matter of fact, as the ground of his work, to that test it is better to refer.

As to the querulous complaints of pretended prescriptions and customs, it may generally be observed, that on prescription and custom many of our most valuable rights and privileges depend; and the title of long possession has probably been allowed in every system of law that has yet been known; for this obvious reason, that the feeling of mankind must ever be in favour of it. It is the abuse and misapplication of this doctrine of which alone complaint can be made;—and to define the line of its proper application should have been his endeavour, and is the object of these observations. The consideration of what the ancient boroughs were—what were free boroughs—and what were the real or pretended privileges of the London citizens, alluded to in the preface—would necessarily fall into the subsequent detail of the facts.

The etymological inquiries of Dr. Brady may also be passed over, as affording, at best, but a very uncertain light, not sufficient to lead the reader on his way, unless he can gain a sight of more satisfactory guides in the course of his pursuit, than the glimmerings to be caught from the investigation of terms used ambiguously in other countries, and probably altogether inapplicable to this.

From the charters adduced relative to the borough of *Great Yarmouth*, and the observations made upon them, it appears that the object was to show that the privileges of a free borough were derived from the crown, and that those privileges had reference chiefly to trade. The first assertion is certainly true, that the privileges of boroughs from the earliest time were derived from the successive kings, as well Saxon as Norman and others. As to the second assertion, the documents produced by no means establish it:—Dr. Brady transposed their chronological order in so singular a manner, that it is impossible not to assume there was some motive in the transposition; and in reading them in the order in which they stand in his book, it would seem that the first documents have only a reference to the trade of *Great Yarmouth*;—but if it is recollected that the quarrel then existing between *Great* and *Little Yarmouth*, was solely with a view to trade, that circumstance is accounted for; and if the charters are taken in their chronological order, a very different effect will be produced on the mind of the reader: particularly if that of King John, which is the first, and resembles the charters of other places of that date, is somewhat minutely examined. From that grant it is apparent that *Great Yarmouth* was then a borough, as it is made to the *burgesses*;^{*} and it was a free borough, because it was held at fee farm, or at a certain rent, as many manors and lands also were;† the boroughs, manors, or lands so held, being called free, and the tenants, free burgesses or free tenants. The privileges first granted are *soc and sac*, which gives them a borough jurisdiction; by other parts of the charter extended to criminal matters or pleas of the crown. *Exemption from suit at county and hundred courts* is also added. There is also a grant of a merchant guild, and other privileges.

Now the question is, what part of the grant forms the distinguishing characteristic of a borough? Is it the having of a merchant guild? What has that to do with the constitution of a borough?—there are many without any such privilege.

^{*} See before, the borough mentioned in *Domesday*, p. 277.

† See also post., *Northampton*.

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- Or is it not that, being by the operation of these privileges exempted from the jurisdiction of the sheriff, who returned the knights of the shire, and paid them their wages, which he could not levy in the boroughs, he directed precepts to the
 a boroughs to return their own members, who were paid by the burgesses themselves?

This view of such charters is much strengthened by the privilege given by this grant, as well as by many others to London, Bristol, Norwich, &c. to elect their own *præpositus*, bailiff, or portreeve, who was within the *borough* what the *sheriff* was in the county.

If this is the proper view of the charter of John to Great Yarmouth, it gives us at once the real nature of a borough. This is the first charter to Yarmouth, from which all the others emanate:—and they afford but little information upon this part of the subject, as they solely relate to the government respecting the trade of the borough, and not to its other municipal privileges. No inference, therefore, to support Dr. Brady's opinion as to the origin of the boroughs can be drawn from this case of Yarmouth, but it seems distinctly to support the view of the question before deduced from the early laws and history of the country.

THETFORD,

The account of *Thetford* in Domesday, which Dr. Brady quotes, is strong, as previously shown,* to establish that the burgesses were *householders* within the borough; for after stating that there were 944 burgesses in the time of King Edward, and only 720 then, being a diminution of 224, it adds, there are 224 houses vacant: from which also it appears that it was only the *paterfamilias*, the actual house-keeper, who was the burgess.

DUNWICH.

The extract from Domesday as to *Dunwich*† is also given by Dr. Brady, as well as the charter by King John. But it

* See before, p. 277, and also Dunwich and Exeter.

† See before, p. 281.

supports the same inferences as the charter of Yarmouth, ^{William and Mary.} being very similar to it, and more strongly marks that exemption from the interference of the sheriff; as, instead of their dues being paid, as they would be if it was not a free borough, through the hands of the sheriff, it is specially provided that it shall be by their own hands.

In this charter also there appear some traces of the capital pledges, of which mention is so often made in boroughs; for it is provided, that when they are summoned before the justices they shall send 12 *lawful men* (legales homines) of their borough, *who shall be for them all*; and by the next provision, which is that they shall be amerced by six honest men of (de) the borough, and six honest men out of (extra) the borough, it is clear that there was a distinction between those persons who lived within and those who lived without it, and that only the former were the burgesses.

NORWICH.

The author also relies upon the extract from Domesday as to *Norwich*.^{*}—but it is difficult to draw any inference from it, either as to the new or the old burgh; and it certainly throws no light upon the point for which it is quoted, but rather against it. It may however be observed, that the assertion in the margin, that the “*burg*,” means castle, is perfectly gratuitous. In many other places in Domesday it clearly means Burgh. borough; and what is there to show that its meaning is different in this instance?

EXETER.

An extract as to *Exeter*[†] is also quoted: from which it appears to be clear that the *householders* paid the king rent for their burgages; for it is said, “the king has here 300 houses, less 15, paying rent; and 48 are lying waste since the king came.”

^{*} See before, p. 275.

[†] See before, p. 168.

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BARNSTAPLE.

The extract as to *Barnstaple** seems at first sight to justify the opinion that burgesses might live out of the borough, because it is stated that there were at Barnstaple, *within the borough, 40 burgesses, and nine without* :† but we have already given the explanation of this passage and others of a similar description.

LIDEFORD.

The extract as to *Lideford*‡ is also subject to the same observation ; and in this case it should be observed, that the burgesses had lands without the borough, which might account for their partial non-residence.

WALLINGFORD.

The extract as to *Wallingford*,§ so far from supporting Dr. Brady's theories, affords a strong inference that the *houses* were the principal point of consideration in the boroughs ; and that the common burdens were borne by the *householders*. The author makes a great mistake in saying that the burgesses are not mentioned in Domesday :—Nijellus is stated to claim a house as heir of Soarding : “sed *“ burgenses testificantur se nunquam habuisse.”*”

1267. He then quotes a charter of Henry II., confirmed by Henry III., in the 31st year of his reign.

This charter, which is one of the earliest, is of a very peculiar description. It should be observed, that it speaks of the *burgesses* as then existing, and consequently this charter should have induced him to assume that there were burgesses before the reign of Henry II.

From the words “*leges suas*,” it appears that they had a constitution of their own then existing, which supports the inference, that the jurisdiction of the boroughs excluded the sheriff. Indeed, that appears more distinctly from the non-intromittant clause which immediately follows, and which

* See before p. 171.

† See before, p. 172.

‡ See also post., Lideford.

§ See before, p. 111..

expressly excludes the *præpositus* of the king, who was the sheriff or his officer, and secures the whole jurisdiction to their own *alderman* or minister in their own borough court, by the judgment of the *burgesses*. William
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It should likewise be remarked, that all the *men* of Wallingford are by this charter exempted from the *house tax*, which they are described in Domesday, as liable to pay for their borough. We have already introduced and observed on this charter.

The prohibition of a market in Cromarsh seems to raise no inference; for the common law would give an action to any person who was injured by a market being established too near his own.*

And as for the rest of this passage, it seems that Dr. Brady in his note (c), has misinterpreted it:—the purport appears to be, that no dealer should be in Cromarsh, unless he was of the merchant guild, the word “in” or “de” being omitted; and then, if he goes there, that is to Cromarsh, or any where else, provided he still belongs to, or gains his livelihood from the market at Wallingford, he should not, under any pretence, do any injury to the market at Wallingford, but act towards the burgesses according to the law of the merchant guild, whether he is within the borough or without.

Dr. Brady translates the word “*aliquis*,”—“any burgess.” If that is the correct translation, the passage indeed supports the statement he has made:—but if it is not, then it rather militates against his doctrine. Now the immediate antecedent to “*aliquis*” is “*mercator*”—and taking that as the proper clue to the translation, then the whole passage, in fact, puts the *non-resident merchant* in contradistinction with the *burgesses*, which appears to be strongly indicated by the peculiar expression—“*ipsis burgensibus*.”

The security held out by this charter, to the burgesses of Wallingford, wherever they may be—the reference to the conduct of a merchant or trader of the merchant guild, whether he is within the borough or without—and the ex-

* See Com. Dig. tit. Market, p. 17.

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emption from toll, passage, and all customs and exactions, wherever they may be in the king's dominions, might at first sight induce an opinion that this charter recognizes non-resident burgesses or traders of the guild; but upon further consideration, it would appear to be the reverse, for none of these privileges or provisions are stated with reference to permanent non-residence, (with the exception perhaps, of the traders;) but the security given to the burgesses wherever they are, seems to be necessary for them in their occasional and requisite absences from home—and the exemptions from tolls, passage, and customs, expressly confined to travellings in their trade, "*in mercationibus*:" and the trader who is mentioned as living without the borough, is still described as living upon or by the market at Wallingford, probably purchasing his commodities there to vend elsewhere, of which practice traces may be found in the early history of other boroughs. It seems, therefore, that these provisions were introduced for the benefit and encouragement of trade, and are to be taken with reference to that view alone, not at all interfering with the other burdens or privileges of the burgesses, confined, as the house tax and the other services are, to those *residing* in the borough. Taking this charter with reference to other places, it is an observation worthy to be considered, that these provisions would not have been so expressly made, if it was at that time the custom and law for burgesses to be non-resident; as the privileges would then have extended to them in their non-residence, without any grant to that effect.

In another part of the charter the king speaks of his *justiciarius de gildâ*; if the crown had such an officer of the guilds where the boroughs were not free, it would destroy every inference which Dr. Brady could draw from the merchant guild, unless all the places, where such an officer of the king had jurisdiction, were boroughs.

IPSWICH.

The extract from Domesday as to *Ipswich** is also cited.

From which it is clear, as observed before, that the burgesses were the *householders*, and that the number of burgesses decreased as the houses became waste: and those who could not pay their guild were distinguished from the rest of the burgesses; and it could hardly be expected that they, not bearing the burdens, could have shared the privileges of the borough.

House-
holders.

EYE.

Dr. Brady also relies upon the market mentioned in the extract as to *Eye*,† which might seem to support his opinion as to the origin of boroughs, being founded in trade—but it proves too much. If the burgesses had been described as in a *guild merchant*, it would have afforded a strong inference, but nobody has pretended to carry the doctrine so far as to say that a *market* made a borough; for there are abundant instances in which there have been grants of markets to lords of manors, where there were no boroughs.

BUCKINGHAM.

In the extract as to *Buckingham*,‡ the 27 burgesses are described as belonging to several different lords or patrons—but it seems to afford no support to Dr. Brady's opinion: if it has any effect, it would seem to be a confirmation of *burgage tenure*; but the plainer inference is, that they resided within the borough, and so were burgesses—although they at the same time held lands in other manors, belonging to the lords whose burgesses they were said to be.

There are many other places mentioned in Domesday, where the burgesses are described in the same manner.§

* See before, p. 280.

† See before, p. 282.

‡ See before, p. 200.

§ See three or four instances in Wiltshire, and other counties.

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NORTHAMPTON.

In the entry as to *Northampton*,* the burgesses are directly connected with the description of their *houses*; and as they became unoccupied, the number of burgesses decreased. It is impossible for a stronger proof than this to be stated, of the burgesses being the *householders*.

House-
holders.

HERTFORD.

The extract as to *Hertford*† appears to mark very strongly the difference between the burgesses and the tenants. The 18 as well as the 146 are all described as burgesses, though it seems they held at the same time of different persons; the 146 were in the soke of King Edward, that is, owed suit at his manor court, or court baron—whilst the others were before the tenants of Harold and Luning.—Differing as to their tenure, and their suit in civil matters; but all *burgesses* as *residents*, and owing suit there to the *court leet*; for matters of police and criminal jurisdiction.

YORK.

The entry as to the city of *York*,‡ so far from supporting Dr. Brady's theory, seems to afford the strongest inferences the other way, and to show as clearly as can be expected, from matters of remote antiquity, what was the nature of a borough—of a burgage house—the inhabitancy of which was then required, and the effect of such inhabitancy.

The house spoken of in the latter part of the entry, seems to have belonged to the church; and the ecclesiastics being free from all military service, on account of their order—as well as of all customs, because they then imposed aids on themselves by their own body—it was probable that it might become a question, whether a house in a borough or a privileged district, was originally held by the church, and so exempt from customs; or whether it was a recent acquisition, and therefore to be held by the church in the same

* See before, p. 219.

† See before, p. 174.

‡ See before, p. 267.

manner as it was in the hands of the person from whom the church had recently acquired it. That seems to have been the question here; it being urged on the one hand, by those of the church and others, that T. R. E. it was held by the church free of custom, and by the *burgesses* on the other hand that it was no further free than the other burgage houses, the residents in which, were in right of the houses free from toll.

As the whole kingdom was divided into shires, so was the city of York, probably from its great extent, subdivided into its *shires* also; one of which was included in the *castle*, and therefore, (as is the case in almost all other boroughs) excluded from the borough, because the military residing there were not to contribute to the burdens of the state, and were exempt from civil suits and services, being bound by their military allegiance, without taking the oaths at the court leet; therefore the shire included within the castle, was not reckoned in the account of the borough.

So also the shire of the archbishop was excluded, because the ecclesiastics paid aids and customs by themselves, and were not liable to do suit at the court leet.

As to the other houses, they are divided into the *hospitatæ*, *inhospitatæ*, *vacuæ*, and those held by the French.

If the ancient classification of the *inhabitants* of any part of the country, with reference to the doing suit at the *sheriff's tourn*, or at the leets, is referred to,* it will be seen, that in order to prevent any person from residing in any place where he had not taken the oaths and given his pledges, every person who resided a year and a day in a place, was called upon, and bound to do his suit at the court leet,† and to give his pledges there; and he was also obliged to render an account of any person who was lodging or residing in his house for temporary purposes, that is, for any time short of a year and a day, which would make him a *resiant* within the leet, and for such persons the permanent *resiant* was responsible.

* See before, Brac. p. 470, et seq.

† And see post. temp. Geo. I., the articles of the wardmote inquests in the city of London.

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Hospitatæ

Inhos-
pitatæ.

Vacuæ.

Houses therefore, inhabited by those who had been there long enough to be suitors at the leet, and subject to pay the customs of the place, were hospitatæ; the occupiers as inhabitant burgesses, bearing its burdens and sharing the privileges of the place, one of which was, being free of toll; and another, being free from the jurisdiction of sheriff, and king's bailiffs. But houses inhabited by persons who were not fixed residents—had not done their suit at the leet—nor given pledges, and were *uncouth*—were inhospitatæ, and they paid only a small custom for their houses, but did not pay the other burdens of the borough—and therefore were not entitled to its privileges and exemptions, and were not *burgesses*.

The “vacuæ” explain themselves, and account for the number of burgesses varying.

The houses occupied by the French seem also to have been excluded from the account of the borough.

So that from this entry it clearly appears, that *the burgess* must have been the *inhabitant of a house*;^{*} but not having his privileges of burgess-ship merely in right, and by the title of his house, but also by virtue of the permanency of his residence, and of his bearing the burdens, and sharing the responsibilities of the borough, and doing his personal service at the *leet*.

Surely this is a reasonable explanation of inhabitancy; particularly with reference to the manners and customs of those early times in which the burgess-rights had their origin: and by no means inconsistent with reason, taken even with reference to the more modern institutions. It certainly is in close analogy to the spirit of our constitution and the common law.

CANTERBURY.

The extract as to *Canterbury*† is very material, not only for the purpose of destroying Dr. Brady's right as to corporators, but also the exclusive right set up by others for freeholders:—for there the distinction is expressly taken

* And see post. 1911, Canterbury.

† See before, p. 75.

between *householders* and *freeholders*; and yet they all seem clearly to be *burgesses*. Some were *householders*, and were to render *gable*—a payment perhaps partaking more of house tax than house rent; and the others, by reason of their holding of the king, were subject, by such tenure of their lands, to do suit for them in the court baron of the borough; or, in other words, were within the *soke* of the borough. It appears also, in confirmation of what was said before as to *York*, that the right of the *householder* was not merely in right of his house, but also in some other personal right;—as here the number of *burgesses* rendering *gable* are lessened by their deaths, although it would be fair to suppose that their houses must have come into the possession of other persons. As to the *burgesses* who were tenants of the lands, their number seems the same, because, in all probability, the holdings would not be altered:—and as the court leet and borough court, or court baron of the borough, were usually held together, and the tenants were compelled to attend the court baron; when there, they were sworn as *resiants*, and so the list of them probably kept perfect:—but, as in after times, much of the jurisdiction of the *leet* was referred to the sessions, and the attendance on it became, in some respects, a matter of form,* the *resiants*, merely as such, ceased to attend: whilst the tenants were compellable, for many reasons, to be at the court baron. Hence, in many boroughs—by the absence of the one class, and the constant attendance of the other, coupled with the voting being confined to freeholders in counties, which was, in some boroughs, thought also to extend to them—that which was originally a concurrent right in *householders* as well as freeholders, was reduced to freeholders only, who were called *burgage* tenants—and hence arose the *burgage* tenure usurpation.

Another inference also arises from this extract, as to *residence*:—some houses are mentioned out of the walls of the city, of which the *burgesses* took the *gable* and customs,† but the king the *soc* and *sac*. No doubt those were houses

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* See stat. 1 Edw. IV. c. 2.

† Perhaps they were *bordarii* to the *burgesses*, as afterwards in Huntingdon.

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built on lands held by the burgesses of the king, over which of course the king had soc and sac; but the house tax belonged to those who held the land, namely, the burgesses. And it is to be observed, that the inhabitants of those houses out of the city are not called burgesses.

It is true the guild is here spoken of, and so far this extract from Domesday might seem to support Dr. Brady:—but any dispassionate reader, perusing the whole passage, would say, that it is impossible to infer that the guild was the great distinguishing feature of a borough: because it is here only spoken of indifferently with other things, and indeed seems subsidiary to the rest. It is, no doubt, one privilege which is very generally found in a borough; but there are places which have guilds, and yet are not boroughs; and some which are boroughs, and yet have not guilds.

ROMNEY.

The 85 burgesses in *Romney** who belonged to the archbishop's manor of Aldington, were *burgesses* of Romney, holding lands of the manor of Aldington, and paying rents to the amount of 6*l*. The tendency of this is to support a burgage tenant-right of voting, if any thing; but, in fact, establishes nothing: it only shows that burgesses might hold of another manor, and consequently, in some degree, proves that their burgess-ship did not altogether depend upon tenure. It also shows that the tenant of an ecclesiastic, not being in demesne, was not exempted from the suit at the *court leet*, as tenants in demesne of the church were; but they were obliged to take the duties and services of the borough upon them, and consequently were *burgesses*.

HUNTINGDON.

From the extract as to *Huntingdon*,† one material inference is to be drawn, that the payments made to the king, or lord, which have been mentioned before, were different from the geld, which appears to have been a general and public tax, and not a local or partial payment. It is clear that the geld was not

* See before, p. 86.

† See before, p. 216.

confined to the *burgesses*, but was paid by the public at large, and here the *bordarii* contributed to it; which is also material to show, that it was not the *whole* of the *inhabitants* who were the *burgesses*, but that some, on account of their servile situation, were excluded, of which kind were the *bordarii*. It is also worthy of remark, that some of these *burgesses*, holding of an abbey in demesne were, in the time of King Edward, freed from all customs, and only paid the public geld; but being seized out of the hands of the church by the earl, they so came to the crown; after which, it seems, they paid all customs:—which confirms the exemption of the tenants of the church in demesne, as noted before; and also that when the *burgesses* cease to be such tenants they become liable to pay customs, &c., as others.

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TETBURY.

Upon the strange error which Brady has made with respect to *Tetbury*, we have already commented.*

BATH.

By the entry as to *Bath*,† the observation that the payment of the geld extended over the whole country, is supported. And the *burgesses* of other men there mentioned show, as observed before, that burgess-ship did not depend upon tenure alone; but that though they held of different lords, they might still be *burgesses* of one borough. Dr. Brady translates the genitive, "*aliorum hominum*,"—"under the protection of other men;" but that seems a gratuitous construction: surely "tenant" is a more obvious one.

MILEBURN.

The market mentioned in *Mileburn* will not help Dr. Brady; because, though such a privilege was certainly sometimes one of the accompaniments of a borough, the borough in that case had nothing to do with the guild. There was at one period a corporation in that place, but it was distinct from the borough. The corporation by some means became

* See before, p. 256.

† See before, p. 163.

William and Mary. extinct, and yet the place still continued a borough, and sent members to Parliament.

ILCHESTER.

Ilchester also affords the same inference: it had a corporation, but the corporators were not the burgesses.

SOUTHAMPTON.

The entry as to *Southampton** does not appear to help Dr. Brady.

PEVENSEY.

The principal peculiarity as to *Pevensey*† was, that the greater portion of the burgesses were tenants of different lords: but that has been observed upon before.‡ Dr. Brady still describes them as under the patronage of those lords; however there appears no ground for that supposition, and the other construction of tenant seems more obvious.

Port dues are mentioned amongst a variety of other things, from whence it would seem that the port and customs dues do not alter the nature of a borough, as Dr. Brady seems to hint as to Yarmouth.

ARUNDEL.

In the entry as to *Arundel*,§ the borough and port are expressly spoken of as distinct. It was not therefore the port which created the borough, but they were separate things, and for different purposes; one for jurisdiction, and the other for the convenience of trade.

The lords who had burgesses are spoken of more distinctly as having their custom: which is strong to rebut the idea of their being merely under their patronage: and shows that they were tenants, and as such had to pay their customs to their lords.

* See before, p. 110.

† See Lewes, before, p. 96.

‡ See before, p. 96.

§ See before, p. 98.

WARWICK.

The persons in the entry as to *Warwick*,* who had *houses*, are called "*burgesses*," and the district in which they lived, and had *sac* and *soc*, is emphatically called "*ipsum burgum*:"—as if the other part of the borough, where there were no burgesses, was treated as different from that part where there were burgesses.

TAMWORTH.

The appurtenancy of the burgesses of *Tamworth*,† to the manor of Coleshill, has been already explained: and it should be here added, that this extract confirms the idea of the burgesses being tenants of other lords, rather than merely under their patronage. Besides which, all these cases go strongly to show, by their being burgesses of one place, and tenants under another manor, that it was not by their being *tenants*, they became burgesses; otherwise they would be burgesses of the *manor* under which they *held*, and not of the place where they *resided*. It also shows that burgess-ship was not acquired at the court baron, but at the *court leet*.

CRICKLADE.

The like observations will apply to the burgesses of *Cricklade*, belonging to the manor of Allborne, which is ten miles from that town; and Ramsbury, which is nine; and Badbury nearly as far.

Dr. Brady closes these extracts from Domesday, by these strange and gratuitous conclusions from them: he says, "we‡ find from them, that the burgesses and *tradesmen* in great towns, had in those times their *patrons*, under "whose protection they traded and paid an acknowledgment "therefore, or else were in a more servile condition, as being "in *dominio regis vel aliorum*, altogether under the power "of the king or other lords, and it seems to me that then "they traded not as being in any merchant guild, society "and community, but merely under the liberty and protec-

* See before, p. 253.

† See before, p. 254.

‡ Page 27.

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“ tion given them by their lords and patrons, who probably
“ might have power from the king, to license such a number
“ in this or that *port*, or trading town.”

In passing, the attention of the reader has been repeatedly drawn to the attempts made by Dr. Brady, to give the burgesses a trading character, as it seems without any foundation or authority: the inferences being directly the other way. Let those who have leisure, glance their eyes again over the extracts from Domesday; and see if there is the slightest pretence for this assumption of the author. Indeed, Dr. Brady seems himself to be aware that this gratis dictum requires some little further support; and therefore he introduces in the margin an assertion, which, for aught that appears to the contrary, as he gives no quotation or authority in support of it, is as gratuitous as the proposition in the text. After all the Doctor's labour of collecting these passages from Domesday, they appear only to end in assertions which they do not support; and it is curious, that the author, who seems to have written his work with the view of showing that boroughs had their origin in grants by the crown, for the benefit of trade, here states, that the burgesses originally traded without being in any merchant guild or community; thereby admitting, as the fact undoubtedly is, that boroughs existed before those communities; and consequently could not have originated in them, nor have been founded upon them.

London. This brings Dr. Brady to the case of London,* which is the place of all others the most likely to support his theory; if in reality there was any truth in it. For it is, and as long almost as history goes back, it has been, the largest place of trade in the country, and has had the greatest and most extensive privileges; the records also, from their importance, have been better preserved than in other places. It is therefore with reference to London, that the question might be more fairly and satisfactorily agitated than any other; and a minute inquiry into its early history would, in all probability, distinctly develop the real history of boroughs.

But to return to Dr. Brady's account of it—he commences with the charter of William the Conqueror, which, in order to confirm his former notion of the lords being the protectors of the trading burgesses, he calls a mere instrument of protection—and for no other reason but to introduce his expressions of “protecting patrons—and charter of protection,” as if there were any essential connexion between patrons protecting trading burgesses, and a charter of general protection like that of William the Conqueror. In truth it is by no means what Dr. Brady misnames it; but is a charter of confirmation of the most valuable privileges they had long enjoyed, and which so far from having an exclusive reference to trade alone—as he would seem to hint—refers expressly to that privilege which was the foundation of boroughs. Every man, as we have shown before, was, by the Saxon law either a *freeman* or a *villain*—the latter could have no property, and was in a state of servitude. A freeman was bound to bring himself within the pale of the law, so that he was *legalis homo* as well as *liber homo*; and if he was not so he was an outlaw—his property liable to be seized—and his person to be thrown into prison. Now the mode of becoming a *legalis homo*, was by doing his suit-royal at the *sheriff's tourn*, there taking the *oath* of allegiance, and *enrolling* himself among the decenners, &c.; but if a man lived within the privileged district of a borough, he might do his suit-royal at the *leet* there: and so he would become a *legalis homo* of the borough. But it is easy to suppose, that either men might be disposed falsely to assert that they were within particular leets;—or lords might assume to hold leets without sufficient grant or authority for that purpose;—or the sheriffs might be disposed to dispute and disallow leets that were claimed;—for either of which reasons frequent disputes would arise, of which traces may be found in our early law books, whether a person was within a particular leet, or whether a lord had a right to hold it; and to prevent these disputes, boroughs were frequently in the habit of obtaining from every succeeding

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king, and sometimes repeatedly from the same king, grants of confirmation of their charters, of which in fact this of London is an instance; as may be seen by accurately examining the words of it. The first observation that arises on this charter is, that there appears at this time to have been no mayor; and Dr. Brady is mistaken, to a degree not to be expected in a man so learned in antiquity, in supposing that portreeve, as stated in his margin, was derived from "port or haven;" because the same appellation for the head officer of the borough existed in many other places where there was no pretence for saying there ever could have been any port or haven. The truth is, that the portreeve in a borough was, as he states, the king's bailiff, and was within the borough what the *sheriff* was in the *county*. And it should be observed, that the city of London had not till many years after this time, the grant of the county of Middlesex, when they had also the power of electing their own sheriffs. In addition to the mention of the portreeve, as an officer then existing, and who is beyond all doubt an officer of a borough, the expression "burgwara," is decisive to show that London was a borough before this charter of William the Conqueror. Dr. Brady translates the word "burgwara," *inhabitants* of the borough: and in truth all who were of the burgwara were inhabitants, but they were also something more—they were the *sworn* suitors at the borough court leet, doing all the *public duties*, and bearing all the *public burdens* of the borough, as well as being *responsible* for all who lived within their jurisdiction: and, in short, were within the borough what the hundredors, the tythingmen, and the capitales plegii were in the county. The reference to the time of Edward the Confessor shows that the burgesses then had privileges; and the grant that they should be law-worthy, shows what the nature of those privileges were. If it can be clearly ascertained what the real meaning of the word law-worthy was at the time this charter was granted, there is no doubt that this ancient document must go far to show what the privileges of boroughs were at that time. The greater and lesser owners

and the knights seem to have been the only persons who, in those times, were treated as independent and free, with the exception only of such dependents upon them who were, from time to time, made free by their immediate lords—by the grant of lands, or the sale of goods. The dependents of any inferior lords, whether villains, bordarii, coliberti, or others were, before they were made free, under the control and disposition of their lords; who, in return, were responsible for them. They were not capable of acquiring a fixed and permanent property in any thing: nor could they transmit their property to their heirs. In short, they were not law-worthy, neither legales nor liberi homines. If they were made free by their lords, which they might be in many ways, they were released from their dominion—they held their lands free—and they became responsible for themselves. Hence began their liability to the jurisdiction of the sheriff, for all their aids, customs, &c.; and to do suit at his *tourn*: having done which, they thereby became *law-worthy*; and would be one of the “legales homines,” liable to be summoned on juries, &c., by the sheriff. Men thus made free in the county at large, were generally tenants of some superior lord; and though they were free themselves, and held their lands in free socage, still they commonly owed some suit at the lord’s court for their lands. But there were others, if not at the time of this charter, very soon after, who had not lands, but still were free;—the former owed suit to the king, and the law, in the *tourn* or *leet* as well as at the lord’s court; the latter only at the *leet*. The object, then, of this charter was, to give to the burgesses of London ready and immediate evidence of their being *law-worthy*, by having done their suit in their own court, although they had not done it in the sheriff’s *tourn*: and the grant that every man should be his father’s heir, after his father’s days, was a recognition of their being free, and not subject to any lord: the former was to protect them against the sheriff—the latter against the claim of any lord.

The author then attributes the possession of freedom to the granting of merchant guilds; the groundlessness of which

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William and Mary. assertion the numerous quotations we have made from the early charters are sufficient to prove.*

The assertion also, that communities meant the ruling inhabitants of cities and boroughs seems to answer itself; besides the refutation it has received from the numerous instances we have quoted, of the application of that term, and "commonalty," to every species of aggregate body.

The partial attempt to support his theory by reference to the foreign "communities" is so unsatisfactory, that it requires no additional comment.

It is singular, that in the next page, the author should have quoted the passage which is to be found in Glanville and other authors, attributing the right of freedom to the *residence for a year and a day in the borough*; and also to watch and ward, to which he refers, and yet should not, from that clue, have discovered the real nature of borough rights; but should have adhered to his notion of their origin in trade, and the power of governing bodies. His error, in this respect, can only be ascribed to the biassed and interested view he was taking of the subject.

Tradesmen.

The next assertion is founded on the assumption that the burgesses were tradesmen, which is begging the whole question; and he rests it only on the charters, which we have before given, and which lead to a contrary conclusion.†

Dr. Brady assumes a distinction between the wealthier part of the burgesses and meaner sort, whom he calls freemen; entirely disregarding the real class of burgesses, and the nature of free condition, which was a qualification for an inhabitant of a borough to become a burgess.

It is strange that so learned an author should also not have discovered, that the very documents he quoted marked the distinction between the borough and the guild; and that the members of the latter were not the whole of the burgesses.

Communia.

He states also,‡ that the "*communiam*" which was granted

* The distinction between the *gilda mercatoria* and the general corporation of the city, was recognized by the courts of law in this reign, in the case of the Mayor of Winchester v. Wilkes, 2 Lord Raymond, 1129; 1 Salk. 203.

† Page 36.

‡ Page 39.

to the citizens of London in the reign of Richard I., was a *select number*, which is contradicted by all the city records quoted by Mr. Norton, and referred to before in this work ;* as well as the decisions cited from the legal authorities.

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It is also a subject of wonder, that when Dr. Brady was quoting the acts done by the sheriff, with the assent of 12 men of each ward, it did not occur to him that they were the *juries* or *inquests at the wardmote*: and it is still more extraordinary that he should have supposed, with all his prejudices in support of the “communiam,” that the “*communitas de quâlibet wardâ*” could be any *select body*, and not, as the known practice was, the whole of the *inhabitant householders*.

Juries.

In referring to the controversy as to the right of electing the mayor, &c. in 1650, Brady most extraordinarily asserts,† “that the arguments on both sides, and the records produced and insisted upon, manifestly proved that ‘the community of the city,’ or, as it is called, the ‘commonalty,’ did consist of a select number of the more discreet, able, wise, and rich citizens, and was not the body of the free-men in general. And that such a select number in cities and burghs was most frequently expressed, meant, and understood by the latin word ‘communa,’ ‘communia,’ or ‘communitas,’ and is or ought to be so at this day.”

How this author could suppose that “commonalty” meant a select body, and that it was the ancient import and true signification of that word in all nations, it is impossible to conceive: or how he could assert that “communitas” had that application, when so many direct instances to the contrary have been shown.‡

It is not correct that either the arguments on both sides, or the records produced in the controversy alluded to, supported the position.

The *argument* for the freemen was, that *all* the freemen formed the *commonalty*, and that they were entitled to vote

* See before, p. 370, et seq.

† See the petitions respecting this, bound up with the pleadings in the quo warranto.

‡ Brady on Boroughs, p. 42.

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It is singular, that in the next page, the author quoted the passage which is to be found in other authors, attributing the right of freedom *for a year and a day in the borough*; and afterward, to which he refers, and yet should not, have discovered the real nature of borough right, and have adhered to his notion of their original power of governing bodies. His error, in only being ascribed to the biassed and interested taking of the subject.

Trades-
men.

The next assertion is founded on the fact that the 'common' body of the 'communes' were not the more discreet, select number of the 'communes,' meant in citizenship, and under the 'communia,' or 'communities' of this day. Dr. Brady assumes a distinction between the 'common' part of the burgesses and meaner sort of men; entirely disregarding the real fact that the 'common' body of the 'communes' were not the more discreet, select number of the 'communes,' meant in citizenship, and under the 'communia,' or 'communities' of this day.

Dr. Brady assumes a distinction between the members of the burgesses and meaner sort of men; entirely disregarding the real nature of free condition, which was the inhabitant of a borough to become a member of it.

It is strange that so learned authors have discovered, that the very doctrine of the distinction between the borough members and the members of the latter were the same.

**Com-
munia.**

He states also,† that the “*con*” included to, sup-
 • The distinction between the gilda merc
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 † Page 36.

• The distinction between the gilda merc
city, was recognized by the courts of law i
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† Page 36.

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to the citizens of London in the reign of Richard I., was a *select number*, which is contradicted by all the city records quoted by Mr. Norton, and referred to before in this work,* as well as the decisions cited from the legal authorities.

It is also a subject of wonder, that when Dr. Brady was quoting the acts done by the sheriff, with the assent of 12 men of each ward, it did not occur to him that they were the *juries* or *inquests at the wardmote*: and it is still more extraordinary that he should have supposed, with all his prejudices in support of the "communiam," that the "*communitas de quâlibet wardâ*" could be any *select body*, and not, as the known practice was, the whole of the *inhabitant householders*. Juries.

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The *argument* for the freemen was, that *all* the freemen formed the *commonalty*, and that they were entitled to vote

* See before, p. 370, et seq.

† See the petitions respecting this, bound up with the pleadings in the quo warranto.

‡ Brady on Boroughs, p. 42.

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for the mayor and sheriffs:—it is true they admitted that certain *representatives** had often been sent from each *ward*, to vote in the name of the whole body of freemen; but they at the same time contended that it was a virtual voting of the whole body, and that it was an arrangement for their own convenience and ease, but that all were still *entitled* to vote.

The argument for the *liveries* certainly insisted upon the *commonalty* being a select body; and perhaps Dr. Brady might have been misled by reading only the petition for the liverymen, which would certainly appear, when taken alone, to support his position.

But it is clear, by the argument on both sides, that from the violence of the people the dread at that time was of *popular commotion*:—the liverymen relied with confidence on that argument; and the freemen were obliged, as far as they could, to ward off the effect of that feeling against them, by appearing in some degree to yield.

The first *record* referred to was the charter of the 16th of John, to the *barons* of London, giving them power to choose a mayor. This is the first charter in which the *barons* were spoken of, and it is apparent that they were called barons from a prior grant of the county of Middlesex to them. The same charter granted them all the privileges which they had before: from which, coupled with the mayor's being appointed for the city of London, and subsequent charters being to the *citizens*, and recognizing the right of the *citizens* to elect a mayor, it is clear that the *barons* meant citizens, and the body at large, and not any select number, of which there is no mention either in or before that charter, nor till centuries afterwards.

Another record produced was an act of the commonalty in the 20th Edward III., 1347,† which was read to show the freemen's rights, as stated above, and their *delegation* of it to certain persons to be elected by them out of each ward.

It appeared clearly that the select body of the liverymen

* And see post. temp. Geo. II. the same as to Norwich.

† It may perhaps be worth observation, that this change took place in London only six years after the Scottish act of parliament, which it so much resembles.

were first sanctioned by acts of the common council, in the seventh and 15th of Edward IV.—acts which, upon general principles, it must be allowed they had no power to make. At least it is certain that such an act could never afford any exposition of the original meaning of the word “commonalty.”

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So much as to Dr. Brady's assertion of the effect of this controversy in the city of London: and it may be added, that if there is any place in which it can be more clearly shown than in another, that “commonalty” meant the body of burgesses, freemen, or citizens at large, it is London. The general terms, burgesses, barons, and citizens, are all that are used in the earliest charters. The commonalty is first spoken of in a grant by Richard, Earl of Cornwall, in the 21st of Henry III., of Queenhithe, to the mayor and *all the commonalty* of London. The same word is mentioned a second time in a charter to London, in the 52nd Henry III., 1268. It is not till long after that period that any trace can be found of an exclusive select body.

Dr. Brady is equally unfortunate in the meaning he gives to the word *communitas*. In the earliest periods of our history it was applied to the *commonalty* of the *whole realm*: afterwards, to the commonalties of *counties*, and only to the commonalties of boroughs in common with other large bodies.

Dr. Brady attempts to show before, (p. 36,) that London had a “*communia*” in the 2nd of Richard I: But surely it is rather too much, first to cite *Hoveden* as an authority for that assertion, when all the charters of London at that time are silent on the point: and next to vouch a clear act of usurpation as a ground for his position. As the *communia* is not mentioned till long after, the probability is, that if it existed at all, the king afterwards refused to sanction it.

But even if the legal existence of the *communia* is granted, how does Dr. Brady thereby at all advance to his next position (p. 37), that the *communia* of London was a select body? For the reasons given above, out of the charters, the inference is the other way. And how the observations which follow, establish a select body, it is difficult to say.

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As to the "probi homines," spoken of in p. 38, those terms were generally applied to all jurymen and others as the "liberi homines," "legales homines," &c.

The two, four, six, or eight *delegates* or *representatives* out of each ward, have been spoken of before.

As to the extract from the private act of parliament relative to Plymouth, it does not expressly show a select body; that is merely a deduction by inference: and if any other meaning can be given to the passage, the inference is destroyed. Now this is an enabling clause, and therefore intended to apply, by express mention, to every person properly within its operation: therefore, though the general terms, mayor and commonalty, might include all the burgesses, if commonalty means the burgesses at large, still, if there were in the borough any such division of the burgesses into mayor, aldermen, common council, and commonalty, as at Plymouth no doubt there was, it was but reasonable, *ex majori cautela*, to add the words, "all other burgesses," to prevent the chance of those who were above the commonalty contending that they were not included in that general term; and such tautologous expressions were by no means uncommon in documents of that date. The same observation in principle applies to the *residents* and *dwellers* in the borough, because there might be persons, who, though possessing property which ought to be subject to the distress, still could not be burgesses or members of the commonalty; as peers, women, inmates, minors, &c. &c.

Dr. Brady then proceeds* with an attempt to support his position, that the "commonalties" were a select number, by quoting the statutes in the reign of Edward VI., and Queen Mary, and a writ which imposed levies upon all the king's subjects, as well as every fraternity, guild, corporation, mystery, brotherhood, company, or commonalty; and he infers that all those names must denote a select number of men.

In one sense, they certainly import a select number, with reference to the general body of the king's subjects, for

* Vide, p. 44.

otherwise they could not be called a company, fraternity, &c. However that was not the point the author was attempting to establish, but that those words meant a "select part of the corporation;" for he goes on to say, that the select number was contradistinguished from the ordinary and general members of the fraternity. And in that sense his observation is not correct: for they obviously mean the whole body of the fraternity, guild, corporation, &c. or otherwise the levies would have been enforced only upon a part of those bodies.

These statutes, therefore, do not support, but contradict the position for which they are cited, notwithstanding the author concludes his paragraph with so positive a reassertion of it.

He also quotes a petition of the commonalty of Huntingdon, of which he says,* that no man can affirm otherwise, than that the commonalty was the corporation, the body politic, or governing part of the borough. The two first terms are certainly properly applied, for the "commonalty," did mean the corporation or body corporate; but the third which so far from being synonymous with the other two, as imported by the passage, is directly contradistinguished from them, is improperly applied, and the "commonalty" did not mean the governing body, but the whole corporation.

Dr. Brady having, as he supposes, thus established the point, that "commonalty" meant the select body, states, that he should cite some modern charters, to support that position; and quotes Banbury, with his construction of which, it was his great object to succeed.

We have already noted the extraordinary manner in which he has dealt with the three places, the charters of which he quotes—Banbury—Higham Ferrers—and Abingdon.

In his quotation of each, he introduces in conspicuous print, the word "only," upon which his whole argument turns; but which is not in either of the charters: and omits,

* Vide, p. 46.

† See before, pp. 110, 1210.

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the word "burgess," which is in them. Thus he arrives at his conclusion; passing over in silence the previous decision by which the *inhabitant householders of Abingdon* were treated as the burgesses. And it should be recollected, that the charters of all these places are the same, and are granted to the inhabitants, for the services they had rendered the queen; and throughout it appears, that the general body of the inhabitants, were the intended objects of the bounty of the queen.

It should also be remarked, that Dr. Brady was, at the time of writing his work, the keeper of the records, and could, no doubt, have obtained easy access to any of the returns, if he had thought fit; and had he examined that of 1563. the 5th of Elizabeth, he would have found a word of a very different import from the exclusive term "only," which he introduced into his work. For it is made by "the whole commonalty" (*totam communitatem*), which it would require as bold, and a more ingenious supporter than Dr. Brady, to apply in any manner to a select body.

Nevertheless the learned author makes that attempt in the next document, for he quotes a return for Oxford to establish his position, which is made by the "mayor and the whole commonalty;" and another of Wallingford,* which is by the "mayor and commonalty;" and he concludes by observing, that these communities had their seals, with reference to which he makes a quotation from Mabillon, but it is difficult to perceive in what manner it helps his argument.

With respect to seals, remarks have been already made. It is therefore only necessary to add, that as to the two places, the returns of which are quoted, the Doctor is peculiarly unfortunate, for in both of them they have always been by the *bodies at large*, and *not* by any select number.

The author then proceeds, as he says, "after defining what burgs" were, to show what was the nature of "parliament burgs;" by which he would seem to import, and indeed it is a part of the course of his argument to show, that there

* Page 52.

was a distinction between parliamentary and other boroughs. But an indiscriminate assumption of that distinction would lead to much error. That there were some boroughs which, from poverty, or being decayed, had ceased to return members to Parliament* is true, but they in no other respect differed from the other boroughs; and it is essentially requisite to keep in view, that they all had the same origin and object, and were of the same nature.

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The discussion which Brady entered upon as to the levying the fifteenths, does not appear to be material, either to his, or the present inquiry.† But it is singular that he quotes a writ directed to the knights, free tenants, and whole community of the county of Cumberland. It would be difficult to show that those words there imported a select number; and still less the community of the kingdom, which he afterwards mentions.‡

The author then adopts another position, for which there appears no proof, that all the boroughs were the ancient demesnes of the king. There is no doubt that some of them were—and there is also no doubt that tenants in ancient demesne had peculiar privileges:—but that all the boroughs were the demesnes of the crown, or on that account were boroughs, or sent members to Parliament, is not true.

Brady quotes writs for the collection of taxes and other

* The following is the list of boroughs which sent members to Parliament; but from poverty and other causes ceased so to do, and were not subsequently restored:—

Newbury, Ely City, Egremont, Bradninch, Crediton, Fremington, Lidford, Modbury, South Moulton, Torrington, Blandford, Bromyard, Ledbury, Rosse, Berkhamsted, Stortford, Greenwich, Tunbridge, Bamborough, Corbridge, Burford, Chipping-Norton, Dedington, Whitney, Axbridge, Chard, Dunster, Langport, Montacute, Stokegursy, Watchet, Were, Alresford, Alton, Basingstoke, Fareham, Overton, Farnham, Kingston-on-Thames, Bradford, Mere, Bromsgrove, Dudley, Kidderminster, Pershore, Jervaulx, Piking, Ravenser, Tickhill, Calais.

‡ The following also were summoned, but refused or neglected to send, and made no return:—

Dunstable, Glastonbury, Odiam, Highworth.

These towns and ports sent representatives to councils, but never to Parliaments:—

Polruan, Exmouth, Teignmouth, Sherborne, Melton-Mowbray, Spalding, Wainfleet, Doncaster, Whitby.

In all 65 boroughs, towns and ports.

† Page 63, see also p. 78.

‡ Page 77, see also p. 80.

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purposes; but they have nothing to do with either the parliamentary or municipal privileges of boroughs; and the same may be said as to the writ which he quotes for summoning the clergy,* and for knighting the king's son, which were special cases, and not generally applicable.

In another part,† Brady appears to confound the cities and boroughs which were the king's demesnes, with those which had charters. If he had confined himself to the latter class he would, no doubt, have been correct; for though the king's demesnes would not include all the boroughs, nor would all the demesnes of the crown be cities or boroughs, yet the definition that a borough was a place existing by the king's charter, either expressed or presumed, would include the whole. Notwithstanding which, Brady says that there were "burgs" which never had any charter; and places which returned members to Parliament that were not boroughs, but only towns of ancient demesne.

But he gives no instances of the latter; and as to the former they would be boroughs by prescription, which presupposes a charter before time of memory.

The author afterwards proceeds to describe the king's demesnes,‡ cities, and boroughs, and for that purpose quotes Domesday, which is the only authority upon the point.

He first gives a list of the amercements of the men and burgesses, farmers of the different "villatæ" at fee farm, who had not paid at the exchequer; which seems not to apply only to boroughs, but to the county at large; and also to places which were not boroughs. And he quotes an ancient writ, from which it appears that the men of "Lindon" had been taxed a tenth instead of a fifteenth, though it was neither a borough nor ancient demesne: which so far from supporting the doctrine, seems to raise a strong inference to the contrary, and to show that boroughs and ancient demesnes were different things.§

In the list which Dr. Brady gives of the boroughs which he

* Page 70.

† Page 73.

‡ Page 82.

§ It has been before shown, in the extracts from Domesday, that there were distinct instances of burgesses not holding of the king. Thus in Canterbury there were 231 burgesses, of whom 19 only held of the king.—Vide ante, p. 78.

describes as ancient demesne, he makes many errors,— he states that *Wendover* was not a borough at that time : but we have seen that Camden so records it, upon the authority of an old inquisition, which he quotes.

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Wycomb is not entered in the *Terra Regis*, nor *Aylesbury*.

Plympton, *Ashburton*, *Cirencester*, and *Huntingdon*, are entered by themselves in *Domesday*, and not in the *Terra Regis* : neither does *Grimsby* appear in the *Terra Regis*.

And the reader must be well aware that there are numerous other boroughs mentioned in *Domesday*, which were not *Terra Regis*.

It is a curious circumstance, that Brady, who so perversely insisted upon the right of the select bodies to elect under the name of "commonalty," should not have considered that term as more applicable to the *inhabitant householders*, whose general right was established by the committee in the reign of James I., which the author himself afterwards quotes ;* and that they would by the ancient law, as *resiants*, owe suit at the *court leet*,† which he mentions as the place in which the mayor of Corfe was chosen and sworn;‡ and also that the burgesses of Christchurch were sworn there. The parliament men for Stockbridge, he says, "were returned "by the *leet* or court baron, and the burgesses of Amersham." From which statement he makes a great confusion between those courts, and seems almost to consider their names as synonymous ;—but we have had frequent occasion to show the essentially distinct character of the two.

Dr. Brady afterwards enumerates many boroughs which were not demesne lands, and which would appear to contradict his former assertion. But he follows them with a correct statement, that all the boroughs had their origin from charters—a point which he seems before to have overlooked.

He then quotes many charters, as those for Truro, Launceston, Liskeard, Grampound, Saltash, Plympton, Preston, Lan-

* Page 127.

† Particularly as that court was in this reign in full existence, of which traces may be found in the courts of law. See *Rex v. Bernard*, Roll. Rep. 152.

‡ Pp. 88, 89.

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caster, Richmond, Hedon. But he seems not to have considered the important clause which characterises the major part of them, viz., the *exemption from suits of shires and hundreds*: and instead of noting their having jurisdictions distinct from the sheriff, accounting for the manner in which they are treated by the sheriffs, and making the whole one consistent system, he attributes their existence and essence to their being free trading towns, with merchant guilds or communities. But this affords no reason why the sheriff should deal with them in any particular manner; nor why they should have their own presiding officers; nor return members to Parliament; nor, in truth, does it connect them in any manner with the municipal government or the general police of the country; for which it is so obvious they were created:—particularly as it has been so repeatedly shown that the merchant guilds were institutions mostly for the purposes of trade, and distinct from the municipal rights.

Brady then refers to the history of New Sarum, and quotes a writ for the appearance of the mayor and commonalty before the king and his council; to which he adds, as usual, “that they were not all the burgesses, but the governing part;” for which he gives no authority; but, on the contrary, it seems that they appeared by their attornies, which the whole body could do, as well as the select number. And he infers from the nature of the proceedings in that case, that the citizens were to pay their talliage, in consideration of the profit they had derived by their trading, but which the document itself does not appear to support.

He also quotes a document with respect to Bristol for the same purpose, and apparently with the same effect. And he vouches London for a similar purpose; after which he says he shall conclude his treatise with these two questions:*

1st. Who named them, and by whose direction and appointment was it that such and such burghs chose and sent burgesses or members to Parliament, and not others?

2ndly. Who then were or ought to be, the electors in real or reputed burghs?

Hein!

In answer to the first of these questions, Brady says, it was left to the sheriff of each county to name and direct which were boroughs and which not. William
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If he meant, as would appear from his subsequent argument, that the sheriff had any power or right to summon or omit any places he thought fit; the assertion is altogether erroneous: for no such power was ever conceded to the sheriff.

If, on the other hand, he only meant that it was the duty of the sheriff to ascertain, according to the fact, what places were boroughs, and which not, and accordingly to send his precept to them, the author is correct. With the former power, the constitution never intrusted the sheriff; the latter duty it cast upon him, and he was bound to perform it under the same responsibility as every other official act; and in the same manner as he would take notice of any liberty, or exempt franchise, which actually existed within his bailiwick. That this was his real duty, appears from the return which Brady himself quotes from the county of Wilts, where the sheriff states the writ was returned by the constable of the castle of Marlborough, because he—the sheriff—could not interfere within the liberty, the constable having the return of all writs there. So likewise the sheriff adds, that there were no more cities or boroughs within his bailiwick; clearly importing, that he issued his precepts, and made his returns, according as there were, in point of fact, more or less boroughs in his bailiwick.

In truth, his office in this respect was ministerial and not judicial. The writ required him to return for every borough, and the returns quoted by Brady are to that effect. Not that the sheriffs were "more or less kind to the boroughs, or that it was his pleasure," as the author describes it, but that the boroughs were incompetent from poverty—or want of population—or other sufficient cause—to return members. Upon which ground, as before urged, they not only ought to have been exempted, but rather to have been prohibited from returning, the consideration for the original grant, which was the necessity of a local jurisdiction, having ceased.

Shelf

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Such a prohibition should not have been enforced by the direction of the king or his council;—for, as we have observed before, it is a principle, that the king cannot reclaim the grant he has made—but in strictness of law it should be by *scire facias* or *quo warranto*, founded on the fact of the consideration of the king's charter having failed.

It is true, sheriffs did not wait for the result of such legal proceedings, but they acted on their own responsibility, according to the existing facts; but still upon the principle of ministerial official function, as declared in the statute of the fifth of Richard II.

As to the second question,—Who were the electors? Brady honestly quotes the decisions of the committee in the reign of James I., and the case of *Colchester*, in which a prescription for a select body to elect, was held insufficient.* And also the Bridport case, in which it was decided, that the commons had the right to vote, because they contributed to the members' wages. Likewise the general resolution in the *Boston* case, "that of common right the commoners should elect." And the *Warwick* decision, that the right belonged to the *commonalty*:—authorities, having the sanction of the constitutional committee, to whose proceedings we have so frequently referred:—and cases drawn from the different parts of the kingdom, and supported so much by reason and evidence.

But the observation which Dr. Brady makes upon them, can hardly fail to create a smile:—he says—"by these five instances, it appears how perplexed and conjectural were the opinions of the committees, and the resolves of the House of Commons."† To which it might be answered, that the number of cases to the same effect are numerous: and though it must be admitted, as shown before, that the decisions of the committees, and of the House, do strangely vary; yet Dr. Brady is probably the only person who would think that the decisions in favour of the householders—the commonalties—or those who contributed to the expence of the members—should be those, of which complaint should

* Page 127.

† Page 131.

be made. However, the Doctor proceeds to say, that the committees and House of Commons judged the "commu-^{William and Mary.}nities" or "commonalties" "of cities or boroughs, to be only the ordinary and lower sort of citizens, burgesses, or free-men, and not the mayor, aldermen, and common council;"* and then he adds—"the ground of this popular error was, that this committee, notwithstanding the two great antiquaries, Sir Robert Cotton, and Mr. Selden, and the oracle of the law, so called, Sir Edward Coke, were members of it, did not truly understand the meaning of the words, 'communitates,' 'civitatum,' et 'burgorum,' which always signified the mayor, aldermen, and common council, when they were to be found; or the steward, or bailiff, or capital burgesses; or, in short, the governing part of cities or towns, by what persons soever they were governed, or names, or titles, they were called or known; which hath been sufficiently evinced by what has been said before, in this treatise upon the subject."

It is impossible to say whether the arrogance with which ignorance is imputed upon such a point to the two great antiquaries, and the extraordinary lawyer, whose names are mentioned—or the boldness with which commonalty is asserted to mean the select body—and the asserting that such a meaning had been fixed upon the term by the previous argument—be the most predominant in this extravagant passage.

The author proceeds by saying, "that if the communities had been truly understood, the committee would have decided that the right was vested in the governing part, which was always a select number."

It is marvellous that such a book should have misled the committee, which sat upon the Banbury case. But it is still more incredible, if the fact did not establish it, that such a work should afterwards have been quoted in the courts of law, and even in the court of dernier resort, as a legal authority.

After this assertion, several returns are quoted, made by the "commonalty;" but for the reasons before given upon

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the unquestionable meaning of that word, they are against the point for which the author contends; and it is unlucky for his argument that they are mostly instances where the right has not been exercised by the select body but by the bodies at large—as Hereford—Leominster—Derby—Nottingham—Colchester—Hertford—Newcastle-upon-Tyne—Boston—Bristol—Exeter—London—one of the returns of which is by the whole commonalty (“*tota communitas*”)—York, which is also by the whole commonalty—Ipswich—Oxford, the return of which was likewise by the whole commonalty—Wallingford—Helston—Windsor—Reading—Lynn—Yarmouth—Wells—Bridport—Colchester—Warwick—Lincoln—Grimsby—Stamford—Rochester, in which the return was “by the mayor, with all and singular the citizens and commoners of the city.”

Upon which Dr. Brady observes, “the meaning whereof is, that the mayor, together with all and singular the citizens and commoners—that is, with all and every citizen who was a commoner, and of the community of the city, which is as much as to say, the whole community of the city chose them—for the ‘*communiarii*,’ or ‘*comminarii*,’ of the city of London, are the common councilmen thereof; and a select number,” &c.*

So that by this mode of reasoning, all and every citizen, is tortured to mean a select number of the citizens.

And with similar propriety the Doctor observes, upon some of the writs he had quoted,† that the words “*assensus villæ*,” and “*assensus communitatis villæ*,” signified the same thing; and that as the community of the town, so the town itself, the government of the town, and the body politic, were and did consist of a select number; as if it were possible, that the assent of the town could, by any construction, mean only the assent of the select number of the town.

Dr. Brady afterwards adds the returns of Bath and Bridgwater; in the latter, the election is by the inhabitants paying scot and lot: and Bath is the only place cited,

* Page 156.

† Page 157.

in which the return was by the common council; the circumstances of which are very peculiar, and the return by the common-council, is no doubt to be attributed to Prynne, who so laboriously and perseveringly insisted upon their right, and maintained it by every means to which he could have recourse.

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Brady relies also upon the returns,* in the reigns of Henry V., Henry VI., and Edward IV., which were made in the county court; but they appear to be "with the assent of the whole commonalty," which was given at the election, before they attended at the court, and a part of the burgesses only went there, not to make the election, but the return, as before explained:—the twelve persons mentioned in the Cambridge and Huntingdon returns, being no doubt the juries who interposed, as constituted bodies existing in the place.

In conclusion, the Doctor was in some difficulty to explain the right of election in those boroughs, where, as he assumes, there was neither charter—custom—nor free burgesses—as in the case of *Cirencester*; and he relieves himself from the difficulty, by asserting, in the first place, that under those circumstances, there could be no borough.

Secondly,—He asserts that *Cirencester* was no borough, and

Thirdly, he states "that it is an error occasioned by want of due observation, and perusal of ancient charters, to say, that the towns which have sent burgesses to Parliament, must be boroughs by prescription;" and he endeavours to extricate himself from the difficulty by saying, "that such places must have been ancient demesne." He is, however, obliged to admit that there is no such thing as a writ directed to any town of ancient demesne.

He then suggests, that the sheriff, having the power to direct his precepts to what places he pleased, "might send them to such large towns of the king's ancient demesne as had a market only by convenience and permission, or charter, without the constitutive clause of a borough or free burgesses."†

* Page 158.

† Page 162.

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But all of this is mere conjecture, unsupported by any fact or authority: and the power of the sheriff to summon what places he pleased, upon which the whole rests, we have already shown to be unfounded in law.

The author then states, that in such boroughs the election ought to be made by the freeholders; such as were possessed of the ancient demesne lands, or those which anciently, by one way or the other, had been in the crown. The first part is unfounded in fact, because in such places, generally speaking, the right was not in the freeholders. And in Glanville's Reports it was expressly decided to be by common right—not in the freeholders, but in the householders.

Dr. Brady adds some few returns of the reign of Edward VI., as *Wycomb*, and *Windsor*; of which latter place some account is given: particularly an extract of the charter of Edward IV.,† by which Dr. Brady says, "it is plain that the corporation or body politic, or community, was the same thing;" which might be conceded to him. And the charter proceeds to grant that the burgesses and inhabitants should be that community—therefore the *burgesses and inhabitants* were the community. But he says, "these burgesses were a *select number* of the chief inhabitants of the town, as," he says, "appears by the books."

In answer to which it is only necessary to be observed, that after repeated discussions, the *inhabitants* have, according to the charter, been declared to be the *burgesses*. And, therefore, it is probable that the author was as incorrect with respect to the fact, as he clearly was with respect to the construction of the charter and the law: and it is most extraordinary that he should afterwards assert, so unhesitatingly, that the "community" was a select number, according to the ancient usage and custom of the town: and quoting the charter of James I., which appoints thirty of the worthy and best inhabitants to be the common council, should still assert that in that provision the mystery of the community or corporation was unfolded.

It is hardly possible that any person could be induced to

* See before, p. 127.

believe that the "common council" could mean the whole body,* particularly when the *inhabitants* were incorporated. However, we must cordially agree with the next paragraph of the author, that "if the ancient charters, writings, "and monuments, of all burghs, or pretended burghs, in "England, were inspected, judiciously examined, and compared one with another, the meaning of the word 'community,' 'community,' or 'commonalty,' would be as "clear and perspicuous as it is in this place of *Windsor*, or "any other city or burgh." But we should add to that observation, that if the meaning was ascertained, or the precedent of *Windsor* investigated, no one would arrive at the conclusion that it meant the *select body*; and, in fact, it was determined in *Windsor* to mean the inhabitants paying scot and lot.

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As Dr. Brady seems to have collected his strength for this passage, and it seems to involve the greater part of his argument, we trust it is not necessary to make any further observation on his work, as it cannot be requisite to comment upon the single authority of *Thetford*, which he quotes from the worst times of James II.; or to attempt to confute the wild propositions with which the work concludes.

Having thus canvassed the doctrines of Dr. Brady, which in all probability produced the decision in the Banbury case—and have been the foundation of the theory upon which the exclusive right of the select, or governing bodies in corporations, has been founded; and as the subsequent history of corporations will only exhibit the successive occasions upon which Brady's doctrine has been adopted, it will be needless to make many additions to our present collection.—After the documents which will complete this reign, a few charters—some prominent decisions in the courts of law—and the leading statutes, materially affecting municipal rights—will alone be requisite to complete this compilation.

* In a case at law, it was urged in argument, that the common council was but a part of the corporation, and that it was a distinct body; but, strange to say, Holt, C. J., observed, "It might not be so." Perhaps in consequence of the publication of Brady's book. See Holt's Reports.

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and Mary.
1696.

But it must not be unnoticed that, in the seventh of William III., the House of Commons provided against any future irregularity in elections, as far as the sheriff was concerned, by enacting,* "that every return to serve in Parliament for any borough, contrary to the last determination of the House of Commons, as to the right of election therein, should be adjudged a false return." Thus placing a stamp of confirmation upon the varying and contradictory decisions which had been previously adopted.

1699. Before closing this chapter, we should also remark, that a committee was appointed in the 11th year of William III.,† to examine all proceedings relative to charters; and what new ones had been granted; and an address was voted to his majesty, that the clerk of the council should lay before the House an account of the petitions and proceedings before the council, relative to all charters granted during his majesty's reign, to corporations sending members to Parliament.

IRELAND.

The same course of interference which had existed in England appears to have prevailed in Ireland, and, perhaps, to as great an extent.

But it is better to allow the documents to speak for themselves; and the state of the corporations will be more accurately discovered from one or two letters written at the time, than from any general description which can be given.

The following is a specimen of interference much less objectionable than many we have seen before.

1690. Letter of Sir Richard Ryvers, recorder of Dublin, recommending a lord mayor for the city.‡

"Honoured Sir,

"I am very sensible how little time you can allow for private addresses, which has hindered me from borrowing any part of it. The mistake already committed in swearing

* 7 & 8 Will. III. c. 7, sec. 1.

† 13 Journ. 164.

‡ Southwell MSS.

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and Mary.
1690.

our present lord mayor, and to prevent a greater in the next, forces me to give you this trouble. The aldermen of this city, upon his majesty's most fortunate reduction of it, were so eager to reassume the government, that they overlooked the necessary medium; and this present mayor was confirmed by his majesty, and sworn without any previous election. It is true he was elected in 1688. But by the *New Rules*, made pursuant to the act of Parliament for regulating this city among other corporations, as he was not confirmed by the government within ten days after his election, it was void.

"He is to serve till Michaelmas next. Our custom is to choose at Easter magistrates to serve for one whole year, to begin from Michaelmas day following. We now must do as we can; and at the next table of aldermen must choose either this present lord mayor to serve out the next year, because he came late in, or the next in order after him; who must also be confirmed by the king within ten days, otherwise they must choose the next, and so forward until some one is chosen whom the king may think worthy his station in that trust.

"One Otterington is next in order to succeed this present mayor, who, for estate, integrity, activity, and loyalty to their majesties (if my opinion, and Jo. Allen's, and most of the other aldermen whom I consulted in this matter may be taken), is as fit to serve as any man below the cushion. And I have reason to believe he will be elected, unless his majesty interposes, to whom all duty will be paid.

"I am credibly informed, that application is made for one alderman Michell to be our next mayor. I have nought to object against him. He may be a fit man in his turn. He is the junior of the whole court of aldermen, *and to disorder the settled course of the city, when without it, the king's service may be as well attended, I am well apprised is neither the king's intent nor your's.* I have served as recorder of this city near 12 years; and nothing of this nature has been attempted in my time, nor do I find it at any other, but after 1641, when there were some Roman catholic aldermen, who

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and Mary.
1690.

being incapable, one Smith was continued for five or six years, &c. &c. &c.

“Honoured Sir,

“Your most obliged and most

“Grateful humble servant,

“R. Ryvers.”

“*Dublin, August 16, 1690.*”

There is likewise another letter from the same person, announcing the election of the lord mayor.*

“*Dublin, August 16, 1690.*

“The gentleman I mentioned in my last to you, is chosen mayor of this city for the next year : to enter on his office the day after Michaelmas day, if his majesty please to confirm the election. A precedent for such confirmation I enclosed with the certificate of the election. The present lord mayor seemed to wave his pretensions on the scrutiny ; and yet seems troubled that he was not chosen.

“If this election be not confirmed by his majesty, within ten days after the date, the election will become void. If his majesty do not approve of the city’s choice, be pleased to signify his commands to me, and they will be punctually observed,” &c. &c. &c.

There is also a letter from Walter Motley, mayor of Dublin, to Sir Robert Southwell.†

“*Dublin, August 19, 1690.*

“Your honour’s letter of the sixth instant I have communicated to some of our aldermen. The objection concerning Sir William Ellis doth not concern us. We were dismissed before he was treasurer. He *came into that place by the popish charter*, which created him alderman and turned most of us out. As for alderman Reader’s continuation above his year, it was by reason of some succeeding mayor’s necessitous condition ; and with the consent of such whose right it

* Southwell MSS.

† Southwell MSS.

was to be treasurer, in consideration of the advantages the city received by his managing that office, which they declined themselves.

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and Mary.
1690.

“Yet in respect of your recommendation, we, notwithstanding, did elect alderman Mitchel to be treasurer during my mayoralty. And I do assure your honour, he is the first alderman below the cushion (although the last of them,) that ever was chosen treasurer. I thought it my duty to let your honour know thus much, that so if anything be insinuated to his majesty or the Duke of Ormond, your honour may give a true information of the whole matter; and that, by the immemorial custom of this city, none is put by from his election in any office or trust in our city in his turn according to his seniority, unless a just cause be assigned,” &c. &c. &c.

It is impossible not to admire the firm but moderate tone in which this letter concludes, with insisting upon the ordinary succession of the corporate officers.

STATUTES.

In the *statutes* relative to Ireland, the same attention is to be found, as in those of England—to the actual *residence* of the officers, with reference to the duties they were to perform—to the oaths they were to take—and to all the general purposes for which they were established.

Thus, in the statute for abrogating the oath of supremacy in Ireland, and appointing other oaths, the persons who are to take them are described as *inhabitants of*, or *residing within*, the realm of Ireland. And in fixing the place where they are to be taken, the words used are the same as in the English statute of the first of William and Mary, chap. 8., “Those who shall *inhabit*, *be*, or *reside* within the city of Dublin, or within 30 miles: or those who *inhabit* at a greater distance at the sessions, where they shall *be* or *reside*.”

Cap. 2.

Reside.

And the 14th, as well as some of the subsequent sections, directs, that* “justices of the peace, within any *county*, *city*,

* So also 4 & 5 William and Mary, cap. 22.

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and Mary.

or *town corporate*, should give warrants to *constables, tythingmen, headburghs*, or other officers, to summon any person of the age of 18 or upwards,* to take the oath of allegiance:—a public duty, which every individual was before bound to do at the age of 12, at the court *leet*.

The interference of magistrates is, by the strict words of this statute, confined to *counties*—where before it would have been executed by the *sheriff* in the *tourn*—and to *cities* and “*towns corporate*.” the latter terms being evidently used incorrectly instead of the word “borough.” For, otherwise, as there are boroughs which are not incorporated, but by reason of their being boroughs, are excepted out of the county, and exempted from the jurisdiction of the sheriff in his *tourn*, such places would not be included at all in this statute, which could not have been intended.

1697.
Cap. 17,
sec. 3.

In the Irish statute of the ninth of William III., for lighting the city of Dublin, the *inhabitants* are, like the citizens of London, to pay for every *house inhabited*.

WALES.

New
Radnor.

In the first year of King William and Queen Mary, the right of the contributory boroughs of *New Radnor* to vote for members to Parliament, came before the committee of privileges, of the convention Parliament.†

The return had been made in conformity with the practice by *certificate*, and the petitioner's counsel, insisted, that by the 27th and 35th of Henry VIII., the burgesses of the five out-boroughs of Ryader, Knighton, Kunckglass, and Kevenlance, ought to vote. And the counsel for the sitting member assented that they were entitled.

The same abuse of the introduction of *foreign burgesses* occurred in Wales, as in England, in consequence of the decisions made supporting their rights:—and we find that in *Tenby* and *Ruthvin*, a petition was presented against the making of “*foreign burgesses*.”‡

* See post., Plympton, p. 1945.

† 10 Journ. 77.

‡ 10 Journ. 428.

William
and Mary.

CONCLUSION.

The *Convention Parliament*, from which so much was expected by the country, undoubtedly did more towards confirming the abuses introduced in the reign of James II., by the attacks upon municipal and parliamentary rights, than any other subsequent Parliament. And the right of the *select bodies* prevailed in the extraordinary cases we have pointed out to an extent never since imitated.

Convention
ParliamentSelect
bodies.

The *next* Parliament, with more regard to the just principles of the constitution, generally speaking supported the rights of the *householders*, and the larger bodies of electors, till the two cases occurred of *Buckingham* and *Banbury*, both probably to be attributed to the work of Dr. Brady.

House-
holders.
Bucking-
ham.
Banbury.

The effect of which, however, was more generally conspicuous at subsequent periods; and the doctrines he inculcated, were unfortunately prevalent till a very recent time—to this moment it requires no small effort to overcome their influence.

A N N E.

Following the course we have suggested in the last reign, our extracts during this period will not be numerous.

1702
to
1714.

STATUTES.

The *statutes* afford nothing necessary to be mentioned, except that* regulating the qualification of members of Parliament: and another relative to the proceedings upon writs of mandamus,† and informations in the nature of quo warranto; the last section of which directs, that no annual returning officer should be re-elected.

* 9 Anne, cap. 5.

† 9 Anne, cap. 20.

Anne.

Another extends the provisions of the splitting act of William III.,* and others correct the fraudulent registration of votes,† and prohibit double returns.‡

The act passed for fixing the qualification for knights of the shire, and burgesses, like all the others before referred to, is silent as to corporations; but it is confined, as all the ancient laws on the subject are, to counties, cities, boroughs, or cinque ports; and to knights of the shire, citizens, burgesses, and the barons of those places.

Universities.

The exception, in the third section, of the members of the universities, is also consistent with the same view, because as those universities did not anciently return members, it was but reasonable that they should be excepted from a statute founded on the ancient laws, which did not apply to them; and that they should be left to the mode of election which they had obtained, by the charter, giving them that privilege.

PARLIAMENTARY CASES.

1702.
Plympton.

The parliamentary proceedings contain the case of *Plympton*; § in which the *burgesses* were, by the resolution fixing the right of voting, declared to be “the mayor, bailiff, and
Right. “freemen, and the sons of freemen, who had a right to
“demand their freedom.

Sons.

Juries.

From the records of this borough, it appears, in accordance with the common law, that the *sons* of freemen were originally presented by the *juries*, who assembled once a-year in the guildhall, in the court called the “fulfilling court:” but that court had been discontinued, by the usurpation of the mayor and aldermen, from the time of James II.; after which, they had taken upon themselves to make freemen, according to their *will and pleasure*, and not according to the deserving of the persons elected, as required by the ancient constitution of the borough, and the language of the bye-laws, established and confirmed in the 21st of James I. The following is an extract from these records:

* See before, 7 & 8 Will. III. cap. 25.

† 12 Anne, cap. 15.

‡ 12 Anne, cap. 5.

§ 14 Journ. 149.

" If any, above the age of 18 *years*, which are *free bur-
gesses born* of this liberty, shall be *presented* in this borough
court, and after warned by the bailiff for the time being, to
come to the court to be *sworn* as freemen, and shall absent
themselves, and not come to the court to be sworn, and
have their freedom, within three months next after such
warning shall, from thenceforth, utterly lose the possibility
of their freedom, and not afterwards be admitted, but as
strangers."

Anne.

1702.
Born.

Nevertheless, on the pretence of reviving the trade in
Plympton, it is said that the mayor and aldermen could
not think of a better expedient than to invite some gentlemen
of the city of Exeter into their society ; thereby to join and
procure a good correspondence in that opulent and trading city.

Upon the inquiry which led to this resolution in 1702, it
was insisted by the counsel for the petitioners, that none but
the *sons* of freemen, when they attained the *age of 18*, ought
to be made free.

Sons.

The counsel for the sitting member affirmed, that no per-
son whatever had a *right* to be made free ; but that the
corporation might make *whom they pleased*. In the course
of the evidence, it appeared that *foreigners* had nevertheless
been made, about 26 years before, to serve Mr. Treby ; and
that they were made *after the teste of the writ*.

Foreigners

That in 1700, the aldermen agreed each to make one free-
man.

That they had yearly *two courts* in the borough, one of
which is called the *fulfilling court*, and the town-clerk then
gives in *charge* to the *jury*, to *present* the names of all the
sons of freemen above the age of 18 years, who are summoned
to come in and take up their freedom.

Fulfilling
court.

One witness said, that it was usual for freemen's *sons* at
18 years of age, to come to the *fulfilling court*, and take up
their freedom, otherwise the bailiff warned them to take it
up. That she had two sons made free, and others of her
sons had been denied about two years since, and *the reason*
was, as Mr. Treby, the town-clerk told her, because they
would not vote as the magistrates would have them.

Anne. Another acknowledged the *jury* at the fulfilling court,
 1702. *presented* the *sons* of freemen, but asserted that it was at
 Jury. the *pleasure* of the mayor and major part of the aldermen,
 whether they would make them free or not.

Another witness also stated, that he had heard some of the aldermen say, that they would make none free but those who would vote against Mr. Hele; and that Mr. Treby being asked why he made so many strangers, said, that "he would make more free, if that were not enough."

The inferences from this evidence are too obvious to require any comment; and a motion was made in consequence, and carried—"That the proceedings of the mayor and corporation of the borough of Plympton, in making freemen after the death of his late majesty, to vote at the last election, was *illegal, and contrary to the rights of the corporation*. And that *those freemen then pretended to be made*, had not thereby obtained any right to vote upon that account, in any future elections."

IPSWICH.

1705. In the fourth year of Queen Anne, *Ipswich* became the subject both of judicial and parliamentary inquiry.

Serjeant Whitaker, who had been removed from his office of recorder, for not having attended the sessions according to his duty,* and for having obtained the books and charters of the corporation, and not having duly advised them, according to his oath as alleged, applied to the court of King's Bench, for a mandamus to *restore* him to that office.

The corporation return, amongst other things, that Ipswich had been an ancient town and borough by prescription, and that the *burgesses and inhabitants* had been a body corporate from time immemorial: which though untrue as a fact, is a decisive recognition on the part of the corporation themselves that the *inhabitants* were a part of their body.†

The return then sets out the charter of Charles II., as far

* 2 Lord Raym. 1233; S. C. Salk. 434. Holt, 443 & 5.

† See Salk. It appears distinctly that the *inhabitants* were treated as the *burgesses*.

as it related to the office of recorder, and the facts upon Anne.
which they had removed Sergeant Whitaker.

Several exceptions were taken to the return, but after much argument, a peremptory mandamus was awarded.

Another petition was presented against the election for this place in the ninth year of Queen Anne.

1710.

The *petitioner's* counsel alleged that it was a *corporation* Petitioner.
by prescription, and to prove it read the charter of *King John*,* John.
which is described in the report as a charter of incorporation. But it should be remembered, that in the grant which is before quoted,† no term of incorporation is used; and the grant is expressly to the *burgesses* and their *heirs*, to be holden *hereditarily*. In fact, it is only a grant of privileges and immunities.

The *sitting member's* counsel alleged (undoubtedly with truth, because Domesday Book proves it to be so) that it was a *borough* by *prescription*. Sitting member.

The petitioner's counsel admitted the right to be in the bailiffs and *freemen*, (when there can be no doubt that the admission should have been that the right was in the bailiffs and *burgesses*)—but they questioned the right of the *out-freemen* by *redemption*, who were *not resident at the time of being made free*. Non-residents.

By the town book it was said to appear that *out-freemen* Evidence.
had always been made—but it will have been seen before in what manner, and under what circumstances:‡—and it was contended that the portmen, commonalty, and freemen at large, had voted in elections without distinction amongst the freemen; and that they had voted for the petitioner to be the recorder.

This last fact seems calculated to have raised a prejudice against the petitioner; and a circumstance of the same description was recently much relied upon by the Court of King's Bench in a modern case of the King against Hall; but it is surely impossible that the conduct of the petitioner in having availed himself of the votes of any particular class of persons on a former occasion should affect the general

* See before, p. 391.

† See before, p. 280.

‡ See before, pp. 511, 569.

Anne. right of election, which concerned not only the petitioner on
 1710. that occasion, but would affect the rights of the burgesses of Ipswich, and the borough at large, for ever.

Witnesses spoke to their knowledge of the borough for 30 or 40 years, and that there never was any distinction amongst the freemen; a fact which is clearly negatived by the former extracts from the dom-book of the borough. They also said that they were all chosen at the great court, and paid *scot and lot*. The latter was impossible for non-residents.

Scot and
 lot.
 Right.

The committee resolved, that the right was "in the bailiff, portmen, commonalty, and freemen, at large."

It is difficult to reconcile this resolution with any just view of the history of boroughs, in general; or of this place, in particular—unless, indeed, the bailiffs, portmen, commonalty, and freemen, mentioned in the resolution, are to be treated as a detailed enumeration of those who would be described by the general term "*burgesses*." The bailiffs, portmen, and commonalty, no doubt, appear from the documents, before stated, to form the body of *burgesses*; but to what class freemen can be applied, as contradistinguished, or separate from the commonalty, it would be very difficult to define.

This determination has been treated as establishing the right of the *non-resident* freemen. But it appears that the objection of the petitioner was only confined to three freemen, *by redemption*, who were not resident at the time they were made free; and, consequently, the effect of the determination is only to say, that it was no objection to a person's voting at Ipswich, that he was not resident at the time of obtaining his freedom.

Freemen. It seems clear from the evidence, that the freemen spoken of by the witnesses must have been *resident*; because they are described as *paying scot and lot*, and bearing offices, which non-residents could not.

Upon this resolution being reported, and read in the House, it was amended, by substituting the "*common council*" for the "*commonalty*"—which so far obviates that objection to the resolution of the committee. The bailiffs, portmen, common council, and freemen, are, in fact, all resolvable into the general term "*freemen*;" the three former

classes being only freemen filling certain offices. The question, therefore, even after this determination, is, who are the "*freemen*?" Of what class they ought by law and usage to be, the early documents, before cited, satisfactorily prove.

Three years afterwards, another petition was presented to the House, respecting the election for Ipswich, upon which the principal question was, as to the *undue making of freemen* at the *great courts*,* which were contended to be unduly constituted for want of one or more portmen present, respecting which the sitting members were allowed to give evidence;—the result of which was, that after hearing the witnesses, and having the charter of *John* read; and other evidence being given; the committee resolved, "that *portmen*† are an essential constituent part of the great court of "Ipswich, without which the court could not be held."

Anne.
1710.

1713.

Charter of
John.
Resolu-
tion.

Another objection was also urged against some of the supposed freemen, that they were made at the petty courts, without having first manifested their rights at the great courts.

The committee resolved, that "the persons voted freemen "at the pretended great courts, at which no portmen were "present, had no right to vote:"—which is an authority to show, that where burgesses or freemen have been illegally admitted, their votes were treated as nullities, notwithstanding their admission.

Resolu-
tion.

CHARTERS.

The following are the only charters which were granted in this reign.

- 1.—1703. 2nd year of Queen Anne, .. Great Yarmouth.
- 2.——— — Wareham.
- 3.—1705. 4th Leominster.
- 4.—1707. 6th New Sarum.
- 5.—1708. 7th Bewdley.
- 6.—1710. 9th Bristol.

* It appears from Serjt. Whitaker's case, in 2 Lord Raym. 1285—that the great court was there described to be "*an assembly of the whole corporation.*"

† Portmen, in truth, meant only the men of the town. Saxonic. Porte. See before, observations on Brady.

Anne.
Great
Yarmouth
1703. 1. That to *Yarmouth* gives to the burgesses a power of choosing a mayor, instead of two bailiffs; and to the corporation the name of "mayor, aldermen, burgesses, and commonalty;" the aldermen being 18, and the common councilmen 36.

2. That to *Wareham* is a charter of incorporation, confiding the government of the town to one mayor, six capital, and 12 assistant burgesses, with a recorder, &c.

1705. 3. That to *Leominster*, appointed justices, with a grant of fairs, &c.

Salisbury.
1707. 4. The charter to *Salisbury* recites, that ambiguities had arisen as to the time and manner of electing aldermen, by reason of the charter of James II.; and that the mayor and commonalty by writing under their common seal had, on the 24th of February, 1706, surrendered their charter, and petitioned the queen to make provisions for the election of the aldermen and assistants, who were the *common council*. The queen, accepting the surrender, incorporated the *mayor, aldermen, assistants, and commonalty*; the first mayor being allowed to continue till another is elected.

A recorder and town clerk are also appointed,—and the first alderman and assistants, who are described as *citizens and inhabitants*.

Provisions are made for the meetings of the common council, and for filling the vacancies of aldermen and assistants.

No mayor is to call a common council unless notice is first given to the justices, who are to consider whether it is expedient. The mayor and aldermen are, the day before the election, to nominate double the number of aldermen who are wanted to fill the vacancies, out of whom the mayor, and in his absence, the recorder is to nominate to the common council one or more as may be required.

In the books of the city are to be found the *oaths of the mayor, the 24 aldermen, the assistants, and of the free citizens*; and yet, notwithstanding this explicit charter, speaking so distinctly of the mayor, aldermen, assistants, and com-

monalty;—for a long time there has been *no commonalty*; but the mayor, aldermen, and assistants, have by a legal sophistry been considered as the commonalty, though they are to be taken out of that body, and consequently must be distinct from them.

Anne.
1707.
Common-
alty.

Either, therefore, there has been no commonalty—and in that case the plain and obvious meaning of the charter has been neglected;—or if there has been any commonalty, it must be the *inhabitant householders*, (subject only to the common law restrictions and exemptions), no other class having been elected out of that body.

Inhabitants

This borough, though created in the reign of Henry III.,* since the time of legal memory, possesses many of the characteristics of the ancient boroughs. It is divided into *wards*—it has always had a *court leet* which belonged to the bishop—and the service at which is expressly mentioned in the *articles* which were made between the bishop and the citizens, in the 34th of Edward I., in consequence of a dispute which had arisen between him and the citizens, as to their being taxed by him, which they resisted;—it was left to their election, whether they would keep their liberties and pay the tax, or whether they would renounce them—they preferred the latter: and accordingly surrendered their privileges. But afterwards, in the 35th of Edward I.—the citizens submitted themselves to the bishop, and *articles* were drawn up between them, by which they were to perform their services to him; the commonalty were to choose the mayor from themselves, and present him to the bishop's steward, and in his absence to the bailiff.

1227.

Wards.

1305.
Leet.

1306.

It is also expressly provided, that the citizens should only be bound to do suit at the bishop's court, called the view of frankpledge (that is, the court leet) twice in the year.

Frank-
pledge.

If, therefore, there has been no charter to alter this part of the constitution of Salisbury, the bishop would no doubt be still entitled and bound to hold the *court leet*; but it has, as in many other places, grown into desuetude, and the last court was held on the 14th of November, in the eighth of George IV.

1827.

* See before, pp. 461, 589.

Anne.

1611.

A charter of incorporation was also granted to Salisbury, in the reign of James I.,* and another confirming it, in the sixth year of Charles I.†

The fact to which we have referred during the Commonwealth,‡ that the return to Parliament was made by the citizens and *inhabitants* of Salisbury, is a strange comment upon the present non-existence of any commonalty.§

There was likewise a charter granted in the 22nd of Charles II., confirming those which had been previously granted. Upon the decision of the committee in 1689, giving the right to the *select body*, which was a manifest usurpation, we have already commented.||

Under the circumstances connected with this borough, it seems clear, that originally the *inhabitants* owed suit and service at the *bishop's view* of *frankpledge*, and ought there to have been admitted, sworn, and enrolled. Nor can there be any doubt, but that such a course might now be adopted;—and the citizens, or mayor and *commonalty*, in their common council, would also have power to make “free citizens.” So that the reformation of the municipal body at Salisbury, might easily be effected by the bishop, or by the mayor and commonalty, or still more desirably, by the conjoint interference of them both.

Bewdley. 5. We have already given the history of *Bewdley*.¶ The charter granted at this period was for the restoration of the corporation, in accordance with the provisions of James I.

1710. But this charter was, in 1710, decided by a committee of the House of Commons to be void; and was likewise so determined by the verdict of a jury in the Court of King's Bench, contrary it is said, to the opinion of the court, on which ground a new trial was afterwards moved for

* See before, p. 1494.

† See before, p. 1664.

‡ See before, p. 1688.

§ Where a charter granted to the mayor and commonalty, that the office of any alderman being vacant, the rest of the aldermen might nominate two burgesses, for the choosing of one of them as alderman, by the commonalty (*per communitatem*); held that, *commonalty included the whole corporation*, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected.—*The King v. Osbourne*, 4 East, 327.

|| See before, p. 1869.

¶ See before, p. 1579.

and obtained; and it is said, the new charter was afterwards acquiesced in by the parties, and the members elected under it.* Anne.

6. It has been shown that *Bristol* was not incorporated, except by a charter of Charles II., which being founded upon a void surrender, was also void in law.†

Queen Anne, in the ninth year of her reign, remedied this defect by a charter,‡ which commences with a recital, that the “mayor, burgesses, and commonalty had petitioned for a grant of all the powers, liberties, &c. which they had thitherto enjoyed, together with such additional privileges, as might seem proper for the good government of the city.” And then proceeds to direct, that Bristol should be and remain for ever an *incorporated* city and county by itself, within as ample and extensive boundaries as it had enjoyed for the then last 40 years. That the *mayor, burgesses, and commonalty*, and their successors should for ever be a body corporate and politic, by the name of “the burgesses and commonalty of the city of Bristol.” 1710.
Incorporated.
Burgesses and commonalty.
Name.

The municipal officers are then confirmed, and provisions are made for filling the vacancies in the common council. Various clauses are added relative to the election of the officers and for the internal regulation of the town; and the charter concludes by granting a pardon to the mayors, aldermen, &c., who had not taken certain oaths, according to the provisions contained in the charter of the 36th of Charles II., and that the royal approbation should be no longer necessary for the election of mayor, aldermen, &c.

Mr. Seyers, who with so much labour and research collected the charters of Bristol, and commented upon them, has the following note respecting the two charters of Seyers.

* 2 Luders, 230, 231.

† Queen Anne, by charter granted to the *burgesses* of Bristol, that they should be a body corporate, &c. &c., and released to the corporation that power of removing its members which had been reserved by a former charter of King Charles the Second, and released any just cause of complaint which might be against the corporation for having acted in opposition to it. *Held*, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by King Charles the Second, and that the queen's charter was *not* therefore void, although the supposed charter of Charles the Second did not exist.—But see Rex v. Haythorne, 5 Barn. & Cres. 410.

‡ See before, p. 1794.

Anne. Charles II. and Queen Anne, containing an accurate view of the facts, though he does not venture to draw the conclusion, which the legal decisions would warrant.

“There are some circumstances attending the preceding James II. charter, which merit consideration. King James, some few weeks before his abdication, by proclamation restored the ancient government of the corporation, and replaced it on its former charter, the surrender of which was cancelled by the attorney-general, and delivered to the mayor. It is questionable, therefore, how far this charter of the 36th of Charles II. is to be considered as valid. The burgesses in general, before the time of Queen Anne's grant, in 1710, seem to have considered it as void, for they refused to serve the offices, and the common council did not compel them by fine, as it might have done if that charter had been esteemed valid. On the other hand, Queen Anne in her charter supposes that of 36 Charles II. to be in force; for she grants a pardon to those who had offended against it, and confirms all former charters, unless contradicted by her own. It is a question of some difficulty and of considerable moment, for the validity of many of the acts of the common council at this day depends upon it; but although I have seen and heard legal opinions relative to it, yet it does not seem hitherto determined.”

1706. It appears that there was a considerable difficulty a few years preceding the grant of this charter, in inducing persons to fill the offices of common councilmen, at Bristol. For there is a case in the law reports of a motion made for an information against a person for not serving the office of common councilman of Bristol:—and it was suggested, that if he might refuse it, the corporation might soon be at an end. Sir Edward Northey, who made the motion, did not put in upon the ground of any obligation by charter to take the office, but that a common councilman was a public officer, and the *corporation a part of the public government*. Lord Holt observing that that was when they had a power to make bye-laws, and that they should make one inflicting a penalty on him who refuses; which he stated was the

proper way. But there seems to have been no reference to the obligatory effect of the charter of Charles II. Anne.

COLCHESTER.

Colchester, which has already supplied many facts* connected with its ancient privileges—its burgesses in Domesday—its grant in Richard I.—its hundred, law courts, and wards, in the reign of Richard II.—the interpolations in its records in the reign of Henry IV.—its ordinances, lot, scot, and common stock, in the reign of Henry VI.—and its being made a perpetual body in the reign of Edward IV.—exhibits also in the reign of Charles I., and the succeeding reigns to that of Queen Anne, many instances of abuse and usurpation.†

We have already seen in the third of Charles I.,‡ that the select body attempted to claim the exclusive right as burgesses to return members to Parliament, but it was negatived, and the common burgesses were restored to their privileges.

Unsuccessful attempts were also made by the common council, in the 10th year of King James, to alter the constitutions of the 29th of Elizabeth, by new orders, which were repudiated by the free burgesses; and in the 13th year of the same reign they were expressly repealed, and the constitutions of the 29th of Elizabeth declared to continue in force. In the 21st of James I., an abortive attempt was made to induce Parliament to grant that the council might elect all the officers; and King Charles, in the 11th year of his reign, granted a new charter,§ by which a mayor was substituted for the two bailiffs; and considerable powers were given to the aldermen and common council.

Nevertheless, in the 14th, 15th, and 20th years of the same reign, the *free burgesses* appeared as electors with the mayor; but nine years after, the select body, whose power and influence had been increased by the charter of Charles I., resumed their usurpations, and an order of that date appears that no *foreigner* should be made *free* without the consent of the majority of the *common council*—a double usurpation—

* 11 Mod. 152. † See before, pp. 273, 365, 588, 747, 795, 899, 968, 1093.

‡ See before, p. 1634.

§ Rolls Chapel.

Anne. first in excluding the free burgesses from a participation in the exercise of that right if it existed, (the free burgesses having always before the charter of Charles I. claimed a concurrent power with the bailiffs and common council); and, secondly, in introducing *foreigners*, contrary to the early records of the borough, which show that the *burgesses* ought to be *inhabitant* and *resident*:—thus assuming to themselves a power which afforded a ready means of out-numbering the legal resident burgesses. In 1656, 1657, and 1658, during the Commonwealth, the *select body*, apparently proud of their newly-acquired power, exercised their assumed right of admitting *foreigners*. In the first, however, of those years, the free burgesses contested the right of returning the members; and although the mayor, aldermen, and common council elected two burgesses, the free burgesses elected two others, and a double return was made—the members chosen by the burgesses, described as elected by the *free burgesses* and *inhabitants*, were seated upon a petition.

Thus within seven years after the select body had been defeated in their claim of the parliamentary right of election, and that of the burgesses at large had been established, as if to prevent the recurrence of an election by the popular party, or the common sort of burgesses, the king granted a new charter of incorporation, giving them a mayor; and increasing the power and influence of the higher officers of the place.

1663. Charles II., in the 15th year of his reign, also gave a charter to Colchester, reciting that of Edward IV., and granting in effect the privileges they had before enjoyed.

1684. But in the 36th of Charles II.—the last year of that king's reign—all the charters of this borough, like the others, were surrendered.

Immediately after the accession of James II., the select body appear again to have exercised their pretended right of admitting foreigners.

1688. That king, at the close of his reign, included Colchester in his proclamation for the restoration of corporations; giving it a new charter—reducing the number of officers to ten

aldermen, including the mayor, ten assistants, and ten common councilmen.

Anne.

1693.

William III., in the fifth year of his reign, granted another charter, reciting, "That the king ratified all the franchises and liberties, &c., to the mayor, commonalty, and their successors. And that he was given to understand, that by pretext of an instrument, to which *the common seal of the mayor and commonalty, by the combination of a few of the same borough, was affixed*, dated in the 36th year of the reign of Charles II., and *enrolled of record* in the Court of Chancery, purporting to be the surrender, by the mayor and commonalty, to the late king, of all franchises, charters, &c. And also that as well by reason of the *pretended surrenders*, and by charters, divers doubts had arisen, concerning their liberties, &c.:—The king then proceeds to regrant and confirm them, &c.

In the second year of the reign of William and Mary, upon a petition, the right of election was, by management rather than by right, *agreed* to be in the *freemen* of the borough, and not as before in the *burgesses*.

1690.

Right
agreed.

In 1690, it will be remembered, Dr. Brady's book was published.

In the fifth of William and Mary, the select body again exercised their assumed right of making foreigners freemen.

1693.

In the seventh of William and Mary, there is a petition of the *freemen and burgesses*, on behalf of themselves and the major part of the burgesses:—which petition is in the same session, called by the House the petition of the *inhabitants*. The report in 1696, stated, that the right was *agreed* to be in the *sworn burgesses*: which must therefore be the proper exposition of the term *freemen*, in whom the right was agreed to be in 1690. In the course of the proceedings, a list of the *free burgesses* is spoken of; and also the *freemen's book*: and freemen are mentioned repeatedly; as well as their right to demand their freedom, and their making apprentices free.

1696.

Free
burgesses.

The *foreigners* who had been admitted under the usurped power of the select body, appear to have attempted to vote at this election; but although the poll was said to be taken promiscuously, and the mayor who refused a scrutiny,

Foreigners.

Anne. carried the election with a high hand, still the *foreigners* are stated to have been entered upon the poll with queries;—an admission, it would seem on all hands, that their right of voting was generally doubted. It would be difficult to contend that the corporation had not a power to admit into their own body, almost any person they liked, for the purpose of permitting them to trade in their borough, and to exempt them from tolls payable to themselves; which, as they were to receive them, they might remit to whom they pleased; and in this sense they might admit *freemen*; but they were essentially different from the ancient "*liberi homines*," or free burgesses, who by the general law, and the particular usage of this borough, were required to be *resident*. That species of burgess the corporation could have no power of making, but in the ancient legitimate manner; and it was contrary to their very nature and all law and usage, that they should be *foreigners*.

After this attempt of the foreigners to vote, the attention of the free burgesses appears to have been roused to the subject.

1696. In the eighth of William and Mary, whilst the above petitions were depending, and five days before the report was made by the committee, the common council appear to have been alarmed, by an anticipation of the result of the proceedings; and in order to ward off the expected effect of it, made an attempt to entice the free burgesses into a consent to the measures they began to think necessary, to continue their influence; for which purpose apparently, they made an order on the 23rd of March, for admitting several persons to freedom, upon payment of such fines as the house should think reasonable; *provided the free burgesses should consent thereto*.

After the previous struggles, and considering that the petitions were then depending, a more decisive admission of the right of the free burgesses could not be framed.

The committee by their report seated the candidate, in whose behalf the *freemen* and *burgesses* petitioned, and unseated the candidate, for whom the *foreigners* had voted.

In the July following, in the same year, four months after

this determination, an order of the common council was made, that "thenceforth, no person being a foreigner and *not having a right to freedom*, should be admitted a *free burgess* without the consent of the free burgesses assembled in the common hall, or the major part of them." The character of this order will easily be seen. The common council had, in the March preceding, admitted the free burgesses' right of dissent; and the decision of the committee having in fact defeated the votes of the *foreigners* who had been before voted admitted, it became necessary for the common council, if they intended to preserve the influence which the power of admitting *foreigners* gave them, to make some further effort to support it;—they accordingly made this order of the 6th of July, which shows as well their anxiety to preserve even any part of this privilege—so essential to their influence—as well as the adroitness with which they struggled for the continuance of their usurpation. They were compelled to admit the right of the free burgesses to dissent, but the artful qualification, "not having a right to freedom," limited that power of dissent; and if this qualification had been maintained by the common council, as they were necessarily to be the judges of those who were within the exception of *having a right of freedom*, it would in effect have given the whole power to them; and made the power of dissent by the free burgesses perfectly nugatory; because there would have been none who, in the opinion of the common council, would have had a right to freedom.

This order, however, seems not to have deceived the free burgesses—they still contended for their right; and in the next year, the ninth of William and Mary, the struggles on this subject were continued, and the effect of them seems to have been, that the *free burgesses* at that time maintained their right. For in April, in that year, an order is made by the common council against foreigners "*setting up their trade*" before they had agreed with the mayor and aldermen, or "the major part of them, for freedom:"—so it appears that the common council themselves, at a time when the matter had been fully discussed, and foreigners had failed in an

Anne.

1696.

1697.

Anne. attempt to vote, took the distinction, before referred to, respecting *freemen admitted to trade*,* and did not venture to carry the admission of foreigners any further; nor indeed did they succeed even in that point without dispute, for in the July following, only three months after, there is an order in the town book, that "no foreigners should be admitted "without consent of the majority of the *free burgesses* as-sembled in the common hall;" which, as far as appears, was the end at that time of this struggle, terminating in the success of the free burgesses.

1702. In the first of Queen Anne, there was another petition by several of the *freemen* of the borough—and also one by the *free burgesses* of the corporation—one or two non-residents appearing to have voted; but the question chiefly turned upon bribery.

1705. In the fourth of Anne, there was a petition complaining of the *mayor's having made great numbers of freemen after the teste of the writ*, though they had no right before to the freedom; and omitting to make others who had a right to be made free. Another petition at the same time by the free burgesses, complained of above 100 freemen having been made in a most unusual manner in *ale-houses*, and country and private places, and not in the town hall as customary, and having no right to be made, being *foreigners*, *almsmen*, or *minors*:—and others were spoken of as having a right to be made free by birth or service.†

1706. In 1706, a petition to the same effect was presented by *other free burgesses*.

1710. In 1710, it was reported upon a petition, that the right of election was *agreed* to be in the *mayor*, *aldermen*, *common council*, and *burgesses*; and the question was, whether the mayor of his own authority, without the consent of the council, could make *foreigners* free:—extracts from the town

Foreigners.

* A similar distinction with respect to freemen, admitted for the purposes of trade, is to be met with in *Dartmouth*. Upon a petition from which place, in 1701, an *honorary freeman* was objected to, because the oath was different from that of a *trading freeman*—the latter obliging them to perform the duties of the corporation: which is not so in the former. This is eleven years after Dr. Brady's book was published.

† See the same before, in Maldon and Dunwich.

books for and against the right were read. Some witnesses also were examined; one who was called to support the right was a Mr. Glasscock, who was three years afterwards committed to the custody of the serjeant-at-arms for refusing an inspection of the corporation books; and who therefore was, in all probability, a decided partisan of Sir Thomas Webster, who insisted on the right of *foreigners*;—the committee decided, that “the mayor could not make foreigners free of the boroughs without the consent of the majority of the aldermen and common council.” The committee should certainly have gone still further, and upon the facts stated above, have decided, that the mayor, aldermen, and common council, could not do it without the consent also of the majority of the burgesses; or more properly, should have decided, that the whole body had the power of admitting foreigners to be freemen of the corporation for the purpose of *trade only*, and in order to exempt them from the tolls and dues of the corporation. But that there was no power in any body to admit *foreigners* to be *burgesses*, who, by all the early documents, should be *inhabitants* and *resident*.

If, indeed, the power of admitting foreigners had then been confined according to the spirit of the order of the common council, in April, 1697, to their setting up trade, there would have been no great reason for complaint. But if it was intended, either by this or any subsequent resolution, that any body in the corporation could admit *foreigners* to be such freemen or free burgesses as should vote for members to Parliament (which must have been the object, if anything was meant, because otherwise the committee had nothing at all to do with the question), then, indeed, with all submission to the committee, it must be allowed, according to the principles and authorities already mentioned, that their decision was erroneous. But it would be unjust to say that they resolved, “the mayor, with the consent of the free burgesses, could make foreigners free burgesses:” they only decided negatively, that the mayor could not do it without their consent.

In July, in the 10th of Queen Anne, there is an order of

Anne.

1710.

1711.

- Anne. the common council, purporting to repeal the order of July
1711. 1697, which they were incompetent to do. They also proposed, by the same order, to confirm the titles of some foreigners who had paid for being admitted freemen, and whose money the corporation was not then in a state to repay. This likewise the common council were not competent to direct; for if the *foreigners* admitted were not good freemen at the time they were made, this order could not make them so. In fact, for the reasons mentioned before, the common council had not the power of making freemen, and consequently could not confirm them. The rest of the order is little more than a repetition of that of the sixth of July, 1696.

It may with propriety be observed of the order of July 1711, that it could not operate to affect the right of freemen to vote for members of Parliament, though it might affect the rights of persons admitted into the corporation for the purposes of trade:—on the principles, therefore, that “*omnia presumuntur esse ritè acta*,” and “the construction of every document should be, that it should rather avail than be nought;” this order must and ought to be referred to the making of persons free of the corporation for the purposes of trade, and not for the purpose of making them the “*liberi homines*,” or free burgesses of the borough.

1714. By the evidence for the sitting member, upon a petition in 1714, it was stated, that this order was made in pursuance of the determination in 1710; but it was not in conformity with that resolution, and was attempted to be supported on a mere usage of 30 years. Still, however, the committee confined the right of making foreigners to the mayor and free burgesses: and the votes of foreigners otherwise elected were struck off the poll, and the petitioner seated.

It should nevertheless be observed of this latter determination, that although it was properly decided that the right of making *foreigners*, if exercised at all, was in the burgesses at large, and not in the select body; still, as they were deciding upon the right to vote for members of Parliament, they should, according to the principles and authorities before stated, and the particular circumstances of

this borough have decided, that no body or class of persons Anne.
 had the power of making *foreigners* freemen, but that *all*
the freemen, (more properly called *burgesses*,) ought to be
resident and inhabitant.

In the 12th of Queen Anne, another petition from this bo- 1714.
 rough was presented, upon which a report was made. The
 right was *agreed* to be the same as that which was agreed Right.
 in 1710, excepting that the word "*free burgesses*" was sub-
 stituted for *burgesses*, showing that in this place those words
 were synonymous. On this petition, the old question, so
 effectually concluded in 1697, and in some degree again set
 at rest in 1710, was revived by the common council: the
 question being, whether the common council, without the
 burgesses, could make foreigners free. The orders of March
 1696, April 1697, and July 1696, were produced; but the
 very material and conclusive order of July 1697, was
 omitted.

The committee resolved, "that the right of making foreigners,
 "not having a right of freedom by birth or service, is in the
 "mayor and free burgesses of the borough in common-hall
 "assembled."

In the course of the inquiry, the free burgesses paying *scot*
 and *lot*, were mentioned.

About the year 1741, the charters and privileges granted 1741.
 by the crown to Colchester* were, in consequence of the proper
 number of corporate officers not being kept up, placed in
 abeyance, by the corporation being unable to continue itself;
 but a new charter was afterwards granted to them in the third
 year of George III., under which the present corporation exists. 1763.

There were in the course of a few years many other peti-
 tions against the return for this borough; but some were never
 determined, and one was withdrawn. In the 29th of George II. 1755.
 the right was *agreed* to be in the *free burgesses duly sworn*.†

In 1781 and 1784, there were other petitions, which turned
 on the qualifications of the candidates.

* See the constitutions of Colchester, published by Mr. Strutt, chamberlain, in
 1822, at Colchester.

† See 2 Lud. 166.

Anne.

In 1788, Mr. Jackson and Mr. Tierney contested this borough. The latter gentleman, in a petition, complained of the conduct of the mayor in having unnecessarily and arbitrarily *adjourned the poll, for the purpose of admitting several persons to their freedom, whom* he afterwards suffered to vote. Mr. Tierney was seated upon the petition. This is the last contest in the borough which tends to illustrate the question as to the nature of the burgesses.

From this history of Colchester, the origin of the borough, the character of the original voters—the *commonalty*, the *burgesses*, *conburgesses*, *freemen*, and *free burgesses*, may be discovered. That they were all originally one class of persons there can be no doubt; and as little that they ought all to have been *inhabitants*. It is evident also, that the introduction of *foreigners* was altogether a *usurpation*, brought about by the unremitting management of the select body in the corporation.

BATH.

As there was a parliamentary decision respecting this city in the course of this reign, it is desirable to give a short history of the citizens of this place.

We have seen, that in the time of William I., there were 64 burgesses rendering 10*l.*, and four score and ten burgesses of other men rendering 60*s.** There was a charter of Richard I. to the citizens, who are subsequently mentioned in a writ of Henry III., and a confirmation to them of the charter of Richard I.; and the citizens are again mentioned in a grant of Edward I. Queen Elizabeth, in the 32nd year of her reign, incorporated the "*inhabitants*" by the name of the mayor, aldermen, and citizens:—the charter giving power to the common council to make of the *inhabitants* of the city free citizens and burgesses, and to swear them. A *court-leet and view of frankpledge* were also granted; and it was provided, that all persons *dwelling and inhabiting* within the city, should be at *scot and lot* with the citizens.

Returns.

The first returns of members to Parliament, which com-

* See before, pp. 163, 164, 367, 463, 522, 1405.

menced from the earliest period in the reign of Edward I., appear to have been by the body at large of the *citizens*. Thus, in the first of Henry V., it was by one person named, and "all the other citizens, by the assent of the whole commonalty." So likewise the 2nd, 5th, 7th, 8th and 9th of Henry V.; 1st, 3rd, 4th, 8th, 9th, 10th, 11th and 13th of Henry VI.; the 12th and 17th of Edward IV. In the 1st, 2nd, 4th, and 5th of Philip and Mary, by the "citizens;" the 14th of Elizabeth, by the "mayor, aldermen and burgesses;" the 26th, 30th and 39th of Elizabeth, by the "mayor and citizens." And in the 1st and 21st of James I.—1st, 3rd and 16th of Charles I.—21st of Charles II.—5th of William and Mary—and 4th of Anne, similar returns. After which uniform acts of the *citizens* and burgesses—and the incorporation of the *inhabitants* by Elizabeth, under the name of "mayor, aldermen, and citizens,"—it would appear to be impossible that a doubt could at any time have been entertained as to their having a right to participate in the elections; yet, in 1661, Mr. Prynne was returned with Mr. Popham by the mayor and aldermen. There was a petition presented against them, but it does not appear in the Journals to have been reported.

1661.

Mr. Prynne however states,* that "it was heard, and that "a right of election was made out to be in the corporation; "the question being, whether all the freemen had only a "voice in the election, or only the mayor, aldermen and "common council."

What was precisely meant by this author, by saying that the right was in the corporation, does not distinctly appear. If he intended to make any distinction between the corporation and the burgesses, his position is inaccurate. For the burgesses had returned the members from the 26th of Edward I. and the corporation was not created until the 32nd of Elizabeth; and as to the right being in the mayor, aldermen, and common council, the uniform returns by the citizens or burgesses to the end of the reign of Charles I., afford a decisive answer.

* Prynne, Brev. Parl. Red. 318.

Anne. In the fourth of Queen Anne, the question, who were the
 1706. burgesses or citizens of Bath? came again before a committee of the House of Commons.

Petitioners. The *petitioners* insisted that the right was in the mayor, aldermen, and all the freemen paying scot and lot.

Sitting member. The *sitting member*, that the right was in the mayor, aldermen, and common council, or capital citizens only.

The petitioners gave in evidence the returns mentioned above, and the charter of Queen Elizabeth; and a witness proved that at Mr. Prynne's election, in 1660, and in those of 1680 and 1681, the freemen polled.

The sitting member insisted, that Bath was a "corporation by prescription:"—which is undoubtedly not the fact, though they relied upon the recital of the charter of Elizabeth to establish it.—And they produced a book of the corporation of 1660, when it was stated that Mr. Popham and Mr. Prynne were elected by the mayor, aldermen, and common council;

1680. and in 1680, the members were elected in the same manner. And they were desirous of calling other witnesses, but the committee declared they were satisfied with the evidence,
 Right. and resolved that the right was in the "mayor, aldermen, and common councilmen only."

Thus, contrary to the unvarying evidence from the reign of Henry V.—by giving effect to a short usage subsequent to 1660—the period at which the utmost irregularities with respect to corporations were introduced;—the select body were treated as the *burgesses*, the latter of whom ought to have returned the members to Parliament—this usage being founded only upon the entries in the corporation books made by themselves, and contradicted by the express evidence of a witness who spoke to the elections. Nor, in estimating the value of the usage, should the pains taken by Prynne to establish the right of the select body, be altogether overlooked.

CASES.

1703. A few cases determined in the courts of law during this reign, ought also to be quoted.

In an action of debt for the penalty of a bye-law made by

the common council of the city of London,* it appeared that
 “the bye-law was, that the company and fellowship of
 “porters having been, time out of mind, a company and
 “fellowship, it was ordained, that they should still remain
 “and continue for ever a company and fellowship; and
 “that no master of any boat, &c. should unload or send on
 “shore any goods, but by such persons as were free of the
 “company:”—to which it was objected, 1st, That the city
 of London could not make a corporation. 2ndly, That a
 corporation could not make a bye-law to bind strangers,
 unless founded on public convenience. Et per cur. The city
 of London cannot make a corporation, for that can only be
 created by the crown. But this is only a fraternity, not a cor-
 poration: and a corporation may make a fraternity. A cor-
 poration is, properly, an investing the people of the place
 with the local government thereof, and therefore their law
 shall bind strangers; but a fraternity is some people of a
 place united together, in respect of a mystery and business, into
 a company; and their laws and ordinances cannot bind
 strangers, for they have not a local power of government.

Anne.

1703.

London.
Bye-law.

Fraternity.

The celebrated case of *Ashby and White*, being an action
 against the returning officer for Aylesbury, for refusing a
 vote, occurred in this year in the King's Bench; and was
 carried by writ of error into the House of Lords.† But as it
 does not relate to the municipal rights of the burgesses, it
 is not necessary to enter further into the facts or law con-
 nected with the case; nor would any thing excuse even the
 mention of it, except its celebrity.

1703.

Ashby and
White.

The connexion of the law of settlement with the same
 principles as those of burgess-ship,‡ particularly with refer-
 ence to *resiancy*, may be collected from the following ex-
 tract, which also exhibit the confusion which then existed in
 the general notions as to corporations and parishes.

1706.

In a case respecting a settlement, *Holt, C. J.*, and *Powell, J.*
 in giving judgment, said, “Coming into a parish, and

* *Cuddon v. Eastwick*, 2 Salk. 192.

† *Ashby v. White*, 2 Raymond's Rep. 938; 6 Mod. 52.

‡ *Holt's Rep.* 582.

Anne. "being *taxed* in a parish, make a good settlement without
 1706. "a *notice* in writing, within the statute of James II. But
 "the law is altered by the third and fourth of William and
 "Mary: and as to voting, they could not take notice that
 Residence. "that implied a settlement; a *bare residence might perhaps*
 "entitle him to that; it was an act that related to the *corpo-*
 "ration, and not to the parish."

1706. To a mandamus directed to the mayor, &c. of the borough
 Lost- of *Lostwithiel* in Cornwall,* to restore *Truebody* to the office
 withiel. of a capital *burgess* of that borough, they returned the consti-
 tution of the borough, and the election of *Truebody*; but
 they show further, that *Truebody left the borough, and*
lived out of it for several years, and neglected attendance at
 the public assemblies, &c., and therefore they removed him
 from his place of capital burgess.

Sir John Hawles, for *Truebody*, took an exception to the
 return; that it did not appear that *Truebody* had any notice
 or summons to attend, and show cause why he should not
 be removed; which was contrary to natural justice, that a
 man should be *disfranchised*, without ever being heard what
 he had to say for himself. Sed non allocatur;—for, per curiam,
if a capital burgess quite leaves the borough, and goes and
resides altogether in another place, there is *no need of sum-*
moning him before he is removed, because *he has abdicated*
the borough, and it is a sufficient ground for turning him
 out; otherwise, if he only left the borough a while for his
 health's sake, &c. And the return was adjudged a good
 return.

1708. *Sir Simon Harcourt* argued this case thus:† There are three
 charges in this information. *First*, for taking men *non in*
communitatem burgi. *Secondly*, for taking men *not of the*
town. *Thirdly*, for making *them free* of the borough. The
 charter of King Philip and Queen Mary says generally,
 "that they may make *omnes homines quoscunque*;" but no
 restrictive words are therein, and so it gives no more than

* *Regina v. Truebody*, Raymond's Rep. p. 12, 174; Holt, 449; S. C. 11 Modern.

† *Regina v. Mayor of Hereford*, 11 Mod. 188, 189. And see before, pp. 212,
 374, 522, 558.

*the law gives.** King James I.'s charter says, "not exceeding three." King Charles II. grants them "to use, exercise, &c., in all and every such manner as theretofore they had done;"† and this seems to restore Queen Mary's charter, and to enlarge King James's; so that this issue about acting under King James's charter, is immaterial.

Anne.

1708.

Mr. Lutwyche. The charter of King Charles II. has, by way of new grant, given them every privilege they had before. The question was, whether there being no restrictive words in Queen Mary's charter, *if thereby they might by law have taken in whom they had pleased into their corporation, from any part of the kingdom, when the queen incorporated the men of such a place only?* Queen Mary's charter grants them a power to make "omnes homines quoscunque tenants and inhabitants;" and the charter of James I. restrains them to three. King Charles II. grants them "to exercise, use, and "enjoy all privileges they at any time before ever used." It is objected, that the issue being upon King James's charter was immaterial, Queen Mary's charter being restored by the general grant of King Charles II.‡

Harcourt, solicitor-general. The affirmative grant imports a restriction in the essential part of the corporation, and not to be compared to the cases of bye-laws, &c., for they are generally incident to all corporations; but this is particular.

Powell, justice. The question is, *whether this corporation can make persons free thereof who live out of the town?*

Holt, chief justice. As this corporation is constituted, *all persons that are inhabitants, are of the corporation as such.* And he said they were *freemen*.

But *Powell*, justice, thought that would be of dangerous consequence, that by *their mere coming and inhabiting there, they should gain a freedom.*

But doubtless by the ancient and common law, a residence for a year and a day within any free borough, made the party free of that borough; and though he was a villain before, he thenceforward became a freeman.

* See before, p. 1495.

† 10 Co. 92.

‡ Rast. Ent. 530.

Anne.

The reader will not fail to observe, that in this case are involved all the leading principles before asserted—the power of admitting freemen is to be limited by local residence, and fit qualification—but being resident, and having the qualifications, the *inhabitants* are entitled to be burgesses. Above all, it is expressly affirmed, that the term “*freeman*” is properly referable to the common law with respect to villinage and freedom.

MUNICIPAL DOCUMENTS.

Besides the few cases quoted above—the following municipal documents of this reign may properly be inserted, as confirming the former records.

HYTHE.

1707. At an *assembly* of the mayor, jurats, and *commoners* then holden, “it was resolved, this assembly will admit all such to their freedom to this corporation as have a right by *birth* or *marriage*, that do appear to *claim* the same, and are *resiant* in this town, and of *ability*, *paying scot and lot*; whereupon five persons *claimed* to be admitted into the franchise, being *free-born*; and thereupon four were *admitted and sworn freemen*, paying the usual fee of 15*d.*”

Scot and
lot.

Resiency. Notwithstanding this entry so positively requires *resiancy*, three years afterwards, the following perversion of a decision of the House of Commons, for the purpose of supporting non-residents, is to be found in an affidavit of the eighth year of Queen Anne.

1710.

“In this year, the election of barons to serve in Parliament for this town and port, was determined by the House “to be in *the mayor, jurats, common council, and freemen*: “upon a question whether the right was in the mayor, “jurats, common council, and freemen; or in such of “them only *as inhabited* in the port, who paid *scot and lot*; “and the determination therefore as appears to this deponent was, that *actual inhabitancy was not necessary* to constitute an elector, provided he was a *corporator* of any of “the descriptions therein mentioned. And before the resolu-

“ tion passed, evidence appears to have been given, that all Anne.
 “ who polled at the election then in dispute, had paid *scot* 1710.
 “ *and lot* ; though some voters on both sides lived out of the
 “ town, from whence this deponent submits it to be inferred,
 “ that the committee from whose decision the House adopted
 “ its determination, did not mean to negative, but rather to
 “ admit the necessity of payment of *scot and lot*.”

It would be difficult to explain how the freemen could pay
scot and bear lot—particularly considering the ancient Scot and
lot.
 services of the barons of the Cinque Ports—if they were not
 resident within the borough.

And although it does not belong to this reign, the follow-
 ing document, the last there will be occasion to cite relative
 to Hythe, may be added for the purpose of showing, that not-
 withstanding this deposition, still some restraint was placed
 upon non-residence. Whether this bye-law can be supported Non-resi-
dence.
 by any principle, analogy, or usage, or can be reconciled
 with the general law, must be left to the candid reader to
 determine.

“ At an assembly held *inter alia*, it was agreed, for the fur-
 ther establishing and better securing the corporation in all its
 just and legal rights and privileges ; that henceforth and at
 all times to come, there shall not be at the same time
 more than *one legal inhabitant* paying *scot and lot* (as they
 are commonly distinguished) *to ten local inhabitants, &c.*”

And yet notwithstanding the distinct history of Hythe
 from the earliest times, and the clear necessity of residence
 to entitle a person to be one of the barons or burgesses : *non-* Non-resi-
dents.
residents were in modern times allowed without restraint ;
 and they, in fact, outnumbered and controlled the inhabi-
 tants, till the recent statute.

PORTSMOUTH.

The following document is found amongst the records of 1707.
Portsmouth of this date.

“ We, the major part of the aldermen in being, of the
 borough of Portsmouth, do hereby demonstrate to the pre-
 sent mayor and to the minor part of the aldermen of the

- Anne. said borough as followeth, viz.—That forasmuch as the mayor
 1707. refuses and neglects to summon a council, in order to choose aldermen and burgesses, to fill up and replenish the corporation with fit members into the many vacancies according to ancient charter, and to our repeated request thereto : if it should so happen that by sickness, deaths, or *necessary absences*, the due proceedings of law or justice should be impeded, we declare ourselves and each of us not accessories to, or accountable for the same.

“ Furthermore, saving to ourselves and successors, further protestations, we declare and protest against all acts, that have, and shall be done in choosing and admitting members ; and disposing of any of the rights, enfranchisements, revenues, or emoluments of the corporation, without the consent of the major part of the aldermen in being, for choosing aldermen, *and without seven aldermen present*, for admitting burgesses ; or doing any other of the aforesaid acts, as contrary to law, charter, and custom, and therefore *void ipso facto*.”

1708. There was another similar remonstrance : and the mayor was removed, Henry Maydman being substituted in his
 1713. place. And in 1713, the town clerk was directed by the mayor and aldermen to expunge the names of 14 persons—said to be illegally called as burgesses—out of the *new* records of the boroughs, that no entry of them might appear.

WALES.

1708. It appears from the following entry, that the same inconveniences arose from the introduction of non-residents in Wales as in England, and the same means were taken to enforce residence.

CARDIFF.

1708. At a *common council* held in the Guildhall, the 22nd of March—an order recited that several persons had been and might be thereafter admitted *burgesses* of the town, who were not or should not be *resident* ; and might thereafter plead to be exempt from payment of toll, to the great

prejudice of the inhabitants paying scot and lot, for preventing whereof it was ordered, that all such out-burgesses or honorary burgesses, who by themselves or their servants, should insist upon the immunities or privileges of burgesses, should be liable and charged with bearing and paying towards the relief of the town, and other charges incident to the said town.*

Anne.
Cardiff.
1708.

In the same book in which this entry is made, the accounts of the churchwardens and overseers for many years are kept and audited; and there are several entries on parish business. Nor can there be any doubt from the borough charges being similarly combined with those for the support of the poor, both in England and Wales, but that originally the sick and indigent poor were provided for, out of the borough common stock.

SCOTLAND.

It was in this reign that the union between England and Scotland was finally adjusted; and the articles for the treaty of union were ratified by an act in the fifth year of Queen Anne; in which it was provided that 16 peers should sit upon the part of Scotland in every Parliament in England, with the same privileges as the English peers; and that 45 representatives should sit in the House of Commons, with the same privileges as the English commoners.

That statute was also amended by the sixth of Anne, chap. 6; and another was passed in the same year for settling the manner of electing the 16 peers and the 45 commoners, in which the royal boroughs were to take a part.

The evils arising from the creation of occasional voters, by multiplying votes for elections of members to Parliament, spread to Scotland, as it had through England. And in the 12th year of this reign a statute was passed for the prevention of this evil: whereby it was enacted, that no conveyance should be effectual where an enfeoffment was not taken, and seisin registered, and given before the teste of the writ;

Cap. 6.

* This would be in restraint of trade, if all who came in were not entitled to be made free.

Anne. adopting that period of time which was so generally in use under the common law of England. And further provision against the splitting of votes, in the eighth sect., in the 16th of George II., chap. 11; and the enrolment of all enfeoffments, and the voters were required by the former statute.

1775. In the 15th of Geo. III., the case of Linlithgow occurred in the House of Lords, from which it appears, that when a person petitions in Scotland to be admitted a burgess, he, in the same manner as has been noted in several places in England, engages to pay scot and lot.

IRELAND.

Some letters and municipal documents of this reign, may serve to throw light upon the application of the *New Rules* at this period: as well as explain the proceedings in the corporation of Dublin, which bear so strong a resemblance to many of the transactions before recorded as to England: particularly with respect to London.

In the sixth year of the reign of Queen Anne, the Irish House of Commons made the following strong resolutions:—

1707.

“Sabbati, 25th of October 1707.

“Resolved, That it is the opinion of this committee, that the privy council of this kingdom hath assumed a power of hearing and determining the right of magistrates of corporations not within the *New Rules*; and that their any way intermeddling in such elections, or making any law relating to the right or possession of the office of magistrates in corporations, not within the *New Rules*, or retaining any petition, or cause relating thereto, is arbitrary, illegal, and of dangerous consequence to the parliamentary constitution of this kingdom.

“Resolved, That it is the opinion of this committee, that on preferring any petition to the council board of this kingdom, complaining of the undue election or return of any magistrates, or other officer of any corporation within the *New Rules*, it is the indispensable duty of the privy council to hear and determine the right of such election, before they approve of

the magistrates or officers of such corporation ; and that the denial thereof is arbitrary and illegal. Anno.

“To which resolutions the question being severally put, the House did agree without any amendment.”

DUBLIN.

The following extract from a letter of this date, will show the municipal proceedings of Dublin at this period.* 1711.

“I doubt not but you will hear of an unlucky contest in the city of Dublin, about their mayor. You may remember (I think whilst you were here, that is in 1709) alderman *Constantine*, by a cabal, for so I must call it, lost his election, and a junior alderman, one *Forrest*, was elected mayor for the ensuing year. *Constantine* petitioned the council board not to approve the election; for you must know by the *New Rules*, settled in pursuance of an act of Parliament, for the better regulation of corporations, their chief officers must be *approved of* by the *governor* and *council*, after they are elected, before they can enter into any of their respective offices ; and if not approved of in 10 days, the corporation that chose them must go to a new election. Now alderman *Constantine*, upon the corporation's return of *Forrest*, complained of it as wrong, and desired to be heard by counsel ; but my Lord Wharton, then Lord Lieutenant, would not admit it. This passed on to the year 1710, and then the present mayor was chosen, alderman *Eccles*, another junior alderman ; and this year, alderman *Barlow*, another junior. *Constantine* finding the government altered, supposed he should have more favour, and petitioned again of the wrong done him ; the city replied, and we had two long hearings. The matter depended on an old bye-law, made about the 12th year of Queen Elizabeth, by which the aldermen, according to their anciency, are required to keep their mayoralty, notwithstanding any licenses or orders to the contrary. Several dispensations and instances of contrary practices were produced ; but with a salvo, that the law of succession should stand good ; and some *aldermen*, as ap-

* Extract of a Letter from Archbishop King, to D^y. Swift, dated May 15th.

Dean

Anne. peared, had been *disfranchised* for not submitting to it, and holding their mayoralty. On the contrary, it was urged, that this rule was made in a time *when the mayoralty was looked upon as a great burden*, and the senior aldermen got licenses from serving it, and by *faction* and *interest* got it put on the junior, and poorer; and most of the aldermen were then papists, and being obliged on accepting the office, to take the oath of supremacy, and come to church, they declined it; but the *case was now altered, and most were ambitious of it*; and a rule or bye-law, that imposed it as a duty and burden, must be understood to oblige them to take it, but could not oblige the electors to put it on them; that it was often dispensed with, as alleged, and altogether abrogated by the *New Rules*, which took the election out of the city, where the charter places it, and gave it to the aldermen only; that since those Rules, which were made in 1672, the elections have been in another manner, and in about 36 mayors, eight or nine were junior aldermen. On the whole, the matter seemed to me to hang on a most slender point; and, being Archbishop of Dublin, I thought I was obliged to be for the city, but the majority was for the bye-law, and disapproved alderman Barlow, who was returned for mayor. I did foresee that this would beget ill blood, and did not think it for my lord Duke of Ormond's interest, to clash with the city; and I went to several of his Grace's friends, whom I most trust, before the debate in council, and desired them to consider the matter, and laid the inconvenience I apprehended before them, and desired them to take notice that I had warned them; but they told me, that they did not foresee any hurt it would be to his grace. And I pray it may not; though I am afraid it may give him some trouble.

"The citizens have taken it heinously, and as I hear, met to-day, and in common council repealed the bye-law, and have chosen aldermen Barlow again. I think them wrong in both, and a declaration of enmity against the council and government, which feud is easier begun than laid. It is certain the council must disapprove their choice, it being

against the *New Rules*, as well as good manners. And what other steps will be made to correct them, I cannot say: whereas if they had appointed a committee to view and report *what old obsolete bye-laws were become* inconvenient, and repealed this among the rest, it would not have given offence; and if they had chosen another instead of Barlow, I believe he would have been approved, and there had been an end of the contest.”*

Anne.

Dublin.
1711.

The following is a letter, among the Southwell MSS., to Lord Dartmouth: Southwell
MSS.
1712.

“My Lord,—I had this evening an express from Ireland, with the enclosed letters from the lords justices, to your lord president; and I had seven letters from members of the privy council, viz.:—from the three chief justices—the chancellor of the exchequer—the auditor-general—and the bishops of Down and Killaloe—also from the deputy clerk of the council.

“In all which they do, in the humblest manner, represent and entreat her majesty that they may be allowed to disapprove of alderman Barlow, and do assure you, that whatever choice afterwards the city shall make, shall be readily approved: they allege, as indeed very true,—

“1. That Barlow was the man, who, after being chosen and rejected last year, was put up again a second time, and was chosen by the city; which Mr. Attorney-General here allows is punishable, and for which they might be prosecuted.

“2. What was done the last year being purely in vindication of her majesty’s prerogative: if, in the instance of this man, it should be given up, it would encourage factious people to nose the lords justices there, which cannot be for her majesty’s service.

“3. It would have a very ill effect upon all other corporations under the New Rules, who would presently think her majesty *had given up her right of rejecting*; and consequently fill them with a spirit of faction not easily afterwards to be reduced.”

* Swift’s Works, xix. 81.

Anne.

Dublin.
1712.

From the lords justices (Sir Constantine Phipps and the Bishop of Tuam), to Mr. Secretary Southwell :

" Dublin Castle, 3rd May, 1712.

" Sir,—Yesterday the lord mayor and aldermen of the city of Dublin proceeded to the election of lord mayor and sheriffs for the next year ; and have elected alderman Barlow for lord mayor, who was twice before disapproved of by the government and council ; and one Gleg and one Somerville for sheriffs, who have also been already disapproved.

" You see by this method of proceeding, they are determined not to choose persons in the interest of the government. But before we approve of this election, we think it necessary to know her majesty's pleasure ; whether, in case alderman Constantine should petition, we may support him in his pretensions. For if we do, it will have this consequence, that there will be successively three good men chosen, by whose management, during their magistracy, the city may be recovered out of the direction of the present set of men, who have strenuously opposed her majesty's prerogative and the right of the council here. But if it be her majesty's pleasure that alderman Barlow should be approved, we shall readily obey, though we apprehend by it, that her majesty's power and prerogative in the city will be absolutely lost ; and therefore we desire you will take such measure as you shall think proper to lay this matter before her majesty, signifying her pleasure to us therein with all expedition, because we shall forbear doing anything thereon until we hear from you."

1713. At a board of aldermen* held at the Tholsell of the city of Dublin, the 29th of September, 1713 ;

" The humble memorial of 19 out of the 24 aldermen of the city of Dublin, to the lord mayor.

" When we last met, your lordship was pleased to nominate alderman Constantine, alderman Mason, and alderman French, to be put in election for the mayoralty : your lordship would not permit us then to proceed to an election, by insist-

* Southwell MSS.

Anne.

Dublin.
1713.

ing that we should choose only one of your then three nominee aldermen, and thought fit to refuse putting the question on alderman Walton's objection against alderman Constantine being put in election for the mayoralty, he *having, for almost two years together refused attending the duty of his place*, since which time her majesty's gracious proposal (the substance thereof was to have another alderman nominated in the stead of the person against whom exception was taken for his having already served as lord mayor, whereby Sir William Founds was very plainly described) to accommodate our differences is come into this kingdom, and was communicated to us at the council board yesterday by the lord chancellor, viz.:—That your lordship should strike out one of your last nominee aldermen and add another alderman to the two, and thereupon we should proceed to an election.

“To show our duty to her majesty, and cheerful compliance with whatever comes recommended by the best of queens, we do hereby declare, that if your lordship will strike out any one of the aldermen nominated by your lordship at our last meeting, and put in the stead of one of your nominee aldermen, any other who has not served in the mayoralty, we will instantly proceed to an election, and thereby prevent the confusion and inconveniences that may attend the not having new magistrates to-morrow in this city; but if your lordship shall, notwithstanding her majesty's gracious interposition, act contrary thereto, by refusing to strike out one of your nominee aldermen mentioned in your own nomination paper, at our last assembly, and before her majesty's royal pleasure was known therein;—we beg leave to protest against your lordship's proceedings therein, and to let your lordship know, that you only—(her majesty's principal secretary of state's letter had expressions in it to the following purport; viz. that if the expedient aforementioned was not readily and thankfully accepted of by the aldermen, which was the utmost condescension they could hope for from the government, then they were to be answerable to their queen and country for all the confusion and inconveniences that might result from their

Anne. non-compliance)—will be answerable for the slight that will
 Dublin. thereby be put on her majesty's recommendation, and for
 1713. the fatal consequences of leaving this city without mayor
 or sheriffs to-morrow: and at the same time we earnestly
 entreat your lordship to take this our necessary applica-
 tion into serious consideration."

Signed by 19 persons.

1713. "The lord mayor put in a petition to the council for
 18 August. leave to rejoin to the aldermen's reply, and yesterday the
 council met, and allowed time to rejoin, and they have given
 him to the 26th to put in his rejoinder, and the aldermen to
 have a copy of it, and the case to be heard on the 9th of
 September; and all the privy councillors in the kingdom
 are to attend at that time.

Coleraine. "While I am speaking of the proceedings of our city, in
 relation to the election of magistrates, I must inform you
 what effect it has on other corporations; for yesterday I had
 an account from *Coleraine*, that because the mayor of that
 town would not, at the desire of the aldermen, call a court,
 and elect two new aldermen and burgesses, in the room of
 so many deceased, sixteen of the aldermen met together,
 and by an act of their own making, disfranchised the mayor,
 chose a new mayor in his room for the remainder of this
 year, elected two new aldermen, and a burgess, and pro-
 ceeded to make several other acts and orders relating to
 the corporation. I give you this account, to let you see
 what influence the proceedings of the city of Dublin have in
 other corporations, and where these matters will end God
 knows. But I think some stop should be put to them by
 some smart steps towards humbling the aldermen of Dublin,
 and then lesser corporations will be afraid of the like pro-
 ceedings for the future."

* Extract of a letter from Mr. Dawson, Southwell MSS.

GEORGE I.

A statute of the fifth of George I., for the quieting and establishing of corporations, recites the 13th of Charles II., and giving a new oath, confirms and indemnifies those who had not taken the former, which are repealed.

1718.
Cap. 6.

Another of the ninth year, relative to the manufacturers of stuffs and yarns in Norwich, provides that all persons *inhabiting* or *living* in the city being such manufacturers, or employing servants in such manufactures, or having any interest, stock, share, or partnership therein, should, upon their request at any court of mayoralty, or assembly of the mayor, sheriff, *citizens*, and *commonalty*, be made *free*, paying one and twenty shillings for such admission; and all persons who should be such manufacturers, and *living* or *inhabiting* in the town, being *foreigners*, should be admitted, paying a sum not exceeding 5*l.*, and they were all to be *sworn*. Regulations are added for the electing and swearing the sheriff, the mayor, and common councilmen.

1722.

Inhabiting.

Free.

In the 11th of George I. an act was passed for preventing the inconveniences arising from the want of the due election of mayors or other chief magistrates of boroughs or *corporations* upon the days appointed by charter or *usage* for that purpose, and directing in what manner such elections should be made. It recites, "that in many cities, boroughs, and towns corporate in England, Wales, and Berwick-upon-Tweed, the election of the mayor, bailiff, or other chief officer, is by charter or *ancient usage*, confined to a particular day or time, without any provision how to act in case no election is made. And it frequently happens that certain acts were required to be done at certain times for completing such elections, and by the contrivance or default of the persons who ought to hold the court or preside in the assembly where such elections ought to be made, or such acts to be done, or by accident, no courts or

1724.
Cap. 4.

Corporation.
Usage.

Cap. 4.

George I. " assemblies have been held, or elections made, or such acts
 1724. " done within the time fixed for that purpose ; in which cases,
 " if elections of such officers could not afterwards be made
 " or completed, or in consequence of such omission, the cor-
 " poration should be dissolved, great mischief might ensue :
 " It provides, that where the elections should not be made on
 " the days appointed, or the election should become void,
 " the corporation should not thereby be deemed or taken to
 " be dissolved or disabled from electing such officers for the
 " future ; but if there is no election, they might meet upon
 " the next day and proceed to the election, and do every act
 " necessary for completing it, in such manner as was usual ;
 " and in case the officer who ought to preside were absent,
 " the nearest in place present was to preside.

" And if no such election should be made, or it should
 " become void, the court of King's Bench might issue a man-
 " damus to proceed to the election."

The third sect. recites, " that in certain boroughs and towns
 " corporate, in England, Wales, and Berwick-on-Tweed, the
 " mayor, bailiff, or other chief officer was nominated, elected,
 Leet. " or sworn, at a *court leet*, or *view of frankpledge*, or some
 " other court ; and by reason of the contrivance or default
 " of the lord or his steward, in not holding the same, or
 " by some accident it hath happened, that no due nomi-
 " nation, election, or swearing of such officers have been
 " made. And enacts that the court of King's Bench might
 " issue a mandamus, and do every other act necessary to
 " be done.

" It also imposes penalties upon mayors, for absent-
 " ing themselves, and cures former omissions and defaults ;
 " but provides that the act should not make void any
 " charter, nor make good any election, where judgment
 " of ouster had been awarded."

This statute requires some remarks, as it is the first legis-
 lative act, directly affecting the nature of boroughs and cor-
 porations. The statute of Charles II., relating only to the
 displacing the members, and that of Queen Anne, to the
 remedies connected with their elections ; but the present

act appears to be founded upon the abuses, which had George I.
crept into these institutions. 1724.

It speaks of boroughs or corporations, as if there were some natural or necessary connexion between them; whereas the fact is notorious, that there are boroughs not incorporated, and corporations which are not boroughs; and the whole tenor of the documents which have been quoted, establishes that the former preceded the latter, by many centuries; and that incorporation was only an additional capacity, superinduced upon the original institution of some boroughs, and omitted in others.

However strange it may appear, after the preceding history has been considered, the courts* have construed this act as if it were confined to corporations alone—omitting the substance, by excluding the boroughs from its purview; and adopting the shadow, or the accidental incident of the corporations, in its stead.

Again, the act in its title and provisions appears to have assumed, that particular days might be fixed for the elections, by charter or usage.

The first is the usual course. *Prescription* might be another ground. But *usage* could not, strictly speaking, fix the election to a particular day, because it can give no right or title, it is only evidence to support prescription, or construe a charter.

It is the more necessary to be precise upon this point, because it is from the doctrine of *usage*, and the variety of anomalous proceedings which it has sanctioned, that the greatest abuses have been introduced. Usage. *h*

Some cases in the Court of King's Bench, in which, in consequence of the corporations having, according to the modern doctrines, neglected to keep up the proper number of the integral parts of their corporation, or to hold their elections on the proper days appointed for that purpose, had been held to be thereby dissolved, were the occasion

* This statute, and the seventh of Queen Anne, have been held in many cases to apply only to corporations—see *Rex v. Marsden* and others, 3 Burr. 1012; *Rex v. Williams*, 1 Burr. 402; S. C. 1 Blac. 93; *Rex v. Wallace*, 5 T. R. 375; *Rex v. Richardson*, 5 East, 969; *Rex v. M'Kay*, 8 Dow. & Ryl. 393.

George I. of this act—which is said to have been drawn by Mr. Justice
1724. Powell.*

The point before asserted, that the reeves, provosts, mayors, and bailiffs, were in fact all the same officers, belonging to the king, seems to be confirmed by this statute, which speaks of the mayors, bailiffs, and other chief officers.

The indistinctness with which the term “corporation” was even at this time used, may be inferred from this circumstance, that in the title of the statute “corporations” are alone mentioned; and in the body of it the terms “towns corporate” are adopted, differing undoubtedly in their nature. And an undue estimate seems to have been formed of the relative importance of the boroughs and corporations, because the mischief which is apprehended is attributed to the dissolution of the corporation; whereas we have already shown instances where, notwithstanding the dissolution of the corporations, the exclusive jurisdiction of the boroughs has continued.

Sec. 3. The third section, in confirmation of the view before taken of the general constitution of the boroughs, refers to the nomination, election, and swearing of the chief officers in the *court leet*; and provides for the court being duly held.

And it is impossible to close the observations upon this statute without remarking, that the evils complained of in the act could have been prevented, if the courts had punished with severity those who had been guilty of the defaults which led to the mischiefs; and, in all probability, those defaults would never have occurred if the simple system of our ancestors had been continued: for in that case all would have known what was proper to be done, and would probably have enforced it. But when a variety of *usages* had been allowed to be introduced, the whole became involved in obscurity and uncertainty, and the proper course being known only to a few, the many had no means of correcting the progress of usurpation.

* See *Reg. v. The bailiff of Bewdley*, 1 Peere Williams, 207; *The king against the corporation of Banbury*, 10 Mod. 346; *Rex v. The mayor of Tintagel*, Mr. Justice Yates' MS. See also *Rex v. Holmes*, same MS. and the modern case of *Tiverton*, 3 Term Rep. 222.

These observations are strongly illustrated by the circumstances connected with the city of *London*. The mysteries and trading companies, which had been much favoured and promoted by James I., had afterwards increased in their importance, and, by degrees claimed the right of interfering with the municipal elections. This led to a long series of disputes and difficulties, eventually calling for the interposition of the Legislature.

After considerable ferment and animosity, an act was passed, which appears to have essentially altered the ancient constitution of the city.

The guilds and companies of London were, like all others, distinct from the municipal government. Nevertheless, consisting in a great degree of the citizens, they had mixed themselves up with the other institutions, and had appropriated to themselves a considerable share of the municipal authority.

The only mode of fully comprehending the statute we are about to cite, will be, to briefly reconsider the original constitution of London—in doing which, the first material point to be laid down is, that in all essential qualities it corresponded with the other boroughs.

It existed, like them, under charters from the crown, beginning from William the Conqueror, which was first granted to the “burghwara,” or men of the borough. Afterwards the charters were to the *citizens*; and Middlesex being granted to them, they were also at one time, like the Cinque Ports, called “*barons*.”

The first presiding officer of London was named as in many other places, “the portreeve.” And the privileges granted to the city and citizens in the successive reigns, in every respect corresponded with those given to other places. It was also, like many other boroughs, divided into *wards*, in each of which a “*wardmote*” was held of all the *citizens resiant* within the ward, who owed their suit there, as it was in fact the *leet* of the ward.

Portreeve.

Wards.
Ward-
motes.

The description of the citizens already quoted from the Year Book, and the Liber Assisarum, corresponds with the

George I. general description of the suitors at this court ; and therefore, the citizens were in substance, the *householders resiant* in the wards, taxable to *scot* and *lot*.

There can therefore be no doubt but it was this class of persons who, as citizens, attended in the wardmotes, as, in fact, they do to the present day.

Free. It is true that they were also required to be *free*, but upon that qualification observations have already been made; and, since villainage has ceased, it ought no longer to exist as a distinction.

Trade. The original doctrines as to freedom, were in some degree connected with the right to trade; and thus there was, from the earliest times, some affinity between the trading guilds and the right to citizenship; though it was only to a very limited extent, and was rather founded upon the position, that a citizen, being unquestionably free, was entitled to trade, than that a trader was entitled to be free of the city, which he was not; unless he was an inhabitant householder paying *scot* and *lot*.

Guilds. The guilds had indeed existed from the earliest time, commencing with the "Cnighton guild;" and others were subsequently recognized as having been duly granted by the king, whilst some were suppressed as adulterine.*

Weavers. In the reign of King John,† the guild of weavers is expressly mentioned in a charter; but they were distinct from the body of the citizens at large,‡ who petitioned for their suppression.

Mysteries. The trading mysteries and companies which arose out of the guilds, were also equally without necessary connexion with citizenship.

Livery-men. It was long after the time of legal memory that any allusion was made in the charters or documents to *livery-men*; and therefore they could not have rights by prescription. Indeed, they could not have had their origin till after

Liveries. the sumptuary statutes, which prohibited the giving of liveries,

* See before, p. 341.

† See before, p. 383.

‡ See before, *Mysteries of Cooks*, p. 955, temp. Edward IV.

for the purpose of curtailing the expences and the power of the lords, by restraining their liveries and retainers.* And it was from an exception contained in those statutes, in favour of the guilds and fraternities, with their wardens and other officers that they had their origin. They are not mentioned in any of the charters of London, and do not occur in any of the documents till *comparatively* speaking modern times. George I.

The articles indeed, in the reign of Edward II., required that the *inhabitants* to be admitted should be of some trade or mystery; but nothing further appears upon that head: and such a requisite is not referred to in the legal definition before cited of the citizens; nor are the liverymen expressly mentioned till long afterwards.

The first instance of any reference to the *liveries* is rather to the *dress* than the persons; and occurs, not in a charter, but in an order of common council, in the seventh of Edward IV., at which the *commonalty* were present, and which directed, "that no freeman or officer of the city should use the *livery* of any lord or other grandee, under the penalty of losing his freedom; and that thenceforth the election of mayor should be made by the common council, the masters and wardens of each mystery coming in their *livery* and by other good men for that purpose specially summoned."† An order which certainly has not the effect of increasing the importance of the livery, but seems rather to disparage them, and is reconcileable with the original elections by the inhabitant householders; because the masters and wardens who were to attend might be also inhabitant householders of the wards, and therefore citizens. The other persons to be specially summoned for that purpose might be the ancient representatives from the different wardmotes. If the order had any other meaning than this, the legality of it might be reasonably questioned. And still more the legality of the ordinance in the 15th year of the same reign, in which it was agreed, "that the masters and wardens of the mysteries of the city in their halls, or other Liveries.
1467.
1475.

* See before, p. 1044.

† Lib. L. fo. 53.

George I. “fit and convenient places of the city, associating with themselves the honest men of their mysteries, *being clad in their livery*, should meet together at the Guildhall, for the election of mayor and sheriffs of the city, and that none others except the good men of the common council of the city should be present at the elections.”*

This ordinance, partly made by members of the mysteries, who had no authority to interpose in the making of bye-laws, altogether changed the right of election from the citizens at large, who were the householders, and were accustomed to meet in the different wards in their wardmotes, to the common council, which appear to have consisted, amongst others, of the masters and wardens of the mysteries, assembling in their halls—an unjustifiable alteration of the constitution of the city, and an indication of the manner in which the trading companies encroached on the municipal rights.

There could be no possible ground for supposing that the masters and wardens of the mysteries, assembled in their own halls, could have any right to interfere with the government of the city, or its officers, either in their election, or otherwise; and, therefore, there can be no doubt that this was another of the usurpations of those bodies.

The weavers, in the reign of King John, had been suppressed for their usurpations upon the citizens; and in the reign of Edward III., an effort had been directly made by the trading companies to assume to themselves the election of the deputies or representatives of the wards, instead of their selection by the wardmotes. A proceeding, as we have observed before, altogether unauthorized by the law or the charters.†

It is a striking proof of the difficulty which is experienced in removing a usurpation once commenced, that this illegal practice continued, without any considerable resistance, till the period of the Commonwealth.

1660. In the reign of Queen Elizabeth,‡ it has been seen, that some attempts were made to restrain the power of making

Lib. L. fol. 113.

† See before, p. 734.

‡ See before, pp. 1238, 1419.

freemen by redemption, which was the great abuse committed by the trading companies. But the regulations then made did not altogether remove the effect of the former ordinance, which was not expressly repealed.

George I.
1650.

A committee was appointed to consider this subject, and a report made by them, upon reading and debating the old charters, and ancient records ; which stated, that it appeared by the ancient charters, that the election of the mayor and sheriff was by the commons and citizens—that is, by several persons chosen out of the several wards joined with the common council—a method consistent with the principles acted upon by other cities and boroughs, when the grand and petit juries occasionally did acts for the whole body of the citizens or burgesses—and London being divided into several wards, had several juries, some of whom, as representatives for the whole ward, went to the common council, which was the aggregate meeting of the persons from the respective wardmotes.

It appears that on the occasion of this discussion, the companies also made a petition upon the same subject, many of the citizens being, as might be expected, members of the companies.

Their petition alleged, that the elections had been made in several ways, and with continual alterations, and disturbances. In the reign of Edward III., by the mayor and aldermen, with the most sufficient men of the ward. In the eighth year of the same king, by the “aldermen and most discreet citizens.” In the twentieth year, by the “mayor and all the aldermen,” and twelve, eight, or six, of every ward, according as the ward should be great or small. All of which was consistent with the view before taken of the elections, as ordinarily made throughout the country ; and these elections appear to have been by the “common counsel” of all the parties assembled—sometimes described as the “whole commonalty,” and sometimes by other names. Which imports that they acted, according to the familiar meaning of the words, by their common counsel or consent, and not as a body called the “common council,” to which any peculiar or artificial character could be attributed.

Common
counsel.

George I. In the petition, it is said, that in the 50th year of Edward
 1650. III., the election was made by a number of the men of
 Mysteries. the *mysteries*; but it seems to want proof; and, at all
 events, if that election were so made, many immediately sub-
 sequent were by the "men of the wards:" so that the claim
 by the men of the *mysteries* seems only occasionally to have
 been exercised, and more frequently superseded—and there-
 fore, at the most, it amounts only to a *disputed usage*, and
 cannot be supported; particularly as the general tenor of the
 charters and records, and the principles of the law, would be
 opposed to it.

In the reign of Edward IV. it is stated, that the *mysteries*
 again interposed, which seems probable, from the order to
 which we have before referred.

The petition rather strongly asserts, that "a great part of
 Companies. "the government of the city was settled in the companies;"
 which might be much doubted, and certainly never ought to
 have existed.

Livery- It is also asserted by the *liverymen*—but considering the
 men. illegality of the order of the 15th of Edward IV., it is hardly
 possible—that they had for nearly two hundred years together
 enjoyed the right of electing the mayor and sheriffs; and in
 the prayer they describe themselves as for the most part the
 most ancient and able *citizens* of the city, which alone can
 explain their interfering at all—for as "citizens," according
 to the legal definition of them, they would be entitled to in-
 terfere; but not as members of the companies or *mysteries*.

These petitions were referred to another committee, and
 another petition was presented by the "citizens and inhabi-
 tants," which stated, that by the ancient liberties of the city
 the *freemen* only could vote in the choice; and complain of
 the *liverymen* having interfered in such elections; and pray
 that the representatives of the freemen, chosen by every
 ward, might be authorized to choose the supreme officers.

The respective petitioners were directed to be heard by
 counsel, and after hearing them the following order was
 made:*

1651. "Whereas by the ancient charters granted and confirmed

* 4th Nov. 1651. Jor. ib. fol. 65 b.

“ to this city, the election of the mayor, sheriffs, and other George I.
 “ officers ought to be by the *citizens* or *commonalty* there- 1651.
 “ of, whereby it is evident that the whole commonalty, Citizens.
 “ either personally (if without confusion it might be done),
 “ or by their representatives chosen by them for that pur-
 “ pose, were to have a vote in all such elections ; but of
 “ later times the masters, wardens, and *liveries* of the several Liveries.
 “ companies of this city, have used, and taken upon them
 “ (with the exclusion of all other citizens), to make the said
 “ elections ; which practice of theirs seems to be grounded
 “ upon an act of common council, made the 23rd day of Sep-
 “ tember, in the seventh year of King Edward IV. ; before
 “ which time the same elections had been made by a certain
 “ number of persons chosen out of every *ward* for that pur-
 “ pose, as appeareth by an act, or order of the common hall,
 “ made in the 20th year of King Edward III., whereby (to
 “ avoid inconveniences happened before that time in general
 “ assemblies of the citizens) that method of elections by re-
 “ presentatives was appointed : Now, forasmuch as divers
 “ *companies* of the citizens of this city have no *liveries* at
 “ all, and so have no manner of vote in the elections by
 “ *liveries* ; and for that, by the constitution of most of the
 “ other companies, *the liveries thereof are not chosen by the*
 “ *whole brotherhood, but by a few*—as, namely, the wardens
 “ and assistants only ; and thereby the greatest part of the
 “ citizens, members of those companies, are also excluded
 “ from having any vote, either in person or representation,
 “ in the elections before-mentioned ; and so that great privi-
 “ lege of choosing their mayor, sheriffs, and other officers, is
 “ wholly taken away from them, to their great grief, occa-
 “ sioning thereby their often complaints : For remedy where-
 “ of, and to the intent the ancient charters of this city, touch-
 “ ing elections, might be pursued and kept inviolable ; be it
 “ enacted and ordained, that from thenceforth the election of
 “ the mayor, sheriffs, burgesses for Parliament, and all offi-
 “ cers of and belonging to the city, formerly used to be
 “ chosen in a common hall, should be made in the common
 “ hall of the city, at such times as had been formerly used

George I. " in that behalf, and by such persons, and in such manner,
 1651. " as there-under mentioned ; that is to say, that the alder-
 " men and common councilmen of every ward of the city,
 " and the like number of other honest men of each ward, to
 " be chosen yearly for that purpose, in the wardmote to be
 " held by the inhabitants of the ward, should be *repre-*
 " *sentatives* of all the *inhabitants* of each ward, as touching
 " every such election, and should for ever thereafter be the
 " only electors in every such election in the common hall,
 " and should be, from time to time, returned by the ward-
 " mote inquests of every ward, respectively, in their presen-
 " tations as *representatives* and electors, for, and on behalf
 " of the *inhabitants* of the same wards ; and should be duly
 " summoned to the common hall, when any election was to be
 " made there by the lord mayor of the city, for the time
 " being, or his officer thereunto appointed : and that every
 " election of any of the officers aforesaid, which should
 " be made by the aldermen, common council, and the other
 " persons to be chosen in every ward for that purpose, or
 " by the major part of them, assembled in the common
 " hall, should be good and effectual to all intents and pur-
 " poses, as if the same had been made by all the citizens of
 " this city, in their own persons ; and that no person or per-
 " sons, save only the electors thereby appointed, should be at
 " any time thereafter admitted unto, or have any vote in any
 " the elections aforesaid : And it was further enacted and
 " ordained, that all former acts, orders, and determinations,
 " theretofore made by the court of common council, or by the
 " citizens of this city, in any court or meeting, for, or touch-
 " ing the election of any the officers aforesaid, should be, and
 " were thereby repealed, and made null and void, to all in-
 " tents and purposes."

Usage. It does not distinctly appear what was the *usage* imme-
 diately after the making of this order ; and considering that
 the Restoration followed a few years afterwards, when all
 the corporations were re-modelled under the corporation act ;
 and considering also the violent proceedings in the reigns of
 Charles II. and James II., the *usage* could not, under any

circumstances, be relied upon ; and as it illegally superseded George I. the ancient constitution of the city, it may be assumed to have been set aside, and the ancient course restored by the statutes of William III.

Had the order in the 15th of Edward IV., produced the subsequent usage which is attributed to it, it is singular that no trace of the interposition of the *liverymen* is to be met with in subsequent charters ; and in concluding the observations which should precede the statute of George I., it may be remarked, that there seems hardly any usurpation in the history of our municipal institutions which has less support of legal principle or warrant, or less foundation in charter or grant of any kind, than the claim set up by the liverymen of London to interpose in the municipal elections.

The guilds—mysteries—and trading companies—doubtless have done, and still are capable of doing, essential services to trade and commerce ; and abundant reasons might be urged for supporting them in their wealth—influence—and privileges ; but their interference should be solely confined to trade and commerce, and they should not be allowed to interpose in the municipal government.

The statute of George I. is intituled “ an act for regulating the elections in the city of London, and for preserving the peace, good order, and government of the city.”

1724.
Geo. I.
cap. 18.

It was preceded by much discussion ; and petitions were presented both in support of it and against it. One of them stated, that “ at the elections by the *liverymen*, numbers of “ people who had no right to vote, broke in with noise and “ violence upon the legal electors, and polled in their own “ and borrowed names, and personated absent electors :”—Complaints necessarily arising out of an election to be made by such extensive bodies as the liverymen of different companies, not known to each other : but which would not be likely to occur, if the elections were by the inhabitant householders of the different wards, sworn and enrolled at the ward-mote or by their representatives, the inquest jury-men, or other selected persons.

With respect to the elections in the wards, other grievances

George I. were suggested in the petition, some of which arose from
 1724. the obsolete qualifications of birth and service; and the
 Birth. exercise of the power of admission by redemption, by which
 many inhabitant householders of proper station in society
 were excluded from being freemen, so that persons called
 Unfree- “unfreemen,” who contributed to the charges of the wards,
 men. complained that they had not a right to vote in the election
 of the ward officers: to which the freemen answered, that
 the “unfreemen” would not entitle themselves by purchasing
 their freedom, though they carried on considerable branches
 of commerce in the city, and yet were exempt from all the
 offices therein. And reference was made to those who paid
 Scot. church and poor, which was contended to be paying their *scot*.

Upon these petitions being presented to the House to bring
 in a bill, it was carried by a majority of 67; there being 116
 for the bill, and 49 against it.

Some of the aldermen petitioned against the bill, alleging
 it to be destructive of their rights and privileges, to which
 the citizens were, by ancient charters, entitled.

Another petition was presented by the mayor, and part
 of the aldermen, in favour of the bill.

An order was made that the clerks of the several livery
 companies should lay before the House the particular grants
 or constitutions by which they were created, with the num-
 bers of their liverymen. And the returns were accordingly
 made by the Goldsmiths, Stationers, Scriveners, Bakers,
 Tallowchandlers, Glaziers, Coachmakers, Haberdashers,
 Merchant-tailors, Clothworkers, Salters, Apothecaries, Glass-
 sellers, Cooks, Fletchers, Painters, Stainers, Grocers, Drapers,
 Waxchandlers, Turners, Joiners, Skinners, Vintners, Broi-
 derers and Pewterers, Fishmongers, Armourers and Braziers,
 Brewers, Barbers and Surgeons, Innholders, Poulterers, Mu-
 sicians, Pattenmakers, Saddlers, Curriers, Leather-sellers,
 Blacksmiths, Loriners, Upholders, Butchers, Farriers, Glo-
 vers, Needlemakers, Fruiterers, Cutlers, Dyers, Tylers and
 Bricklayers, Weavers, Coopers, Ironmongers, Plumbers,
 Distillers, Framework-knitters, Masons, Carpenters, Plas-
 terers, Cordwainers, Founders, Girdlers, Bowyers.

It should be observed, that many of these companies have been, comparatively speaking, of modern creation;* as they have gradually increased in number, and therefore they cannot have any claim to prescriptive privileges. The present number is said to be 75, and the number of the liverymen 12,080. In the register for 1833, the number of liverymen were 9,516—of inhabitant householders 8,790. In 1834, the number of liverymen were 9,272, and inhabitant householders 9,016, being a decrease from the whole number of 18 from the preceding year: the householders having increased 226, and the liverymen decreased 244.

Counsel and witnesses were heard, and many records produced; after which a debate took place upon the bill; and in the publications of that date it is said, “that the bill created a great ferment among the citizens.” They were invited by public notices to assemble at Guildhall to consider it. The lord mayor and aldermen, as it is said in the published debates, “resenting this attempt upon their authority, ordered the gates of the Guildhall to be shut as soon as the business of the common council, which was then called, was finished. And having acquainted the government with what had passed, the guards were thereupon doubled at St. James’s Palace, Leicester House, and Somerset House; and by those precautions (as it is said), all things were kept quiet; and a printed paper was dispersed for the satisfaction of the citizens, and to warn them against the inferences which might be drawn against them, if they were precipitated into any acts of disorder, as at the elections, which the bill was introduced to prevent.”

The discussions upon the bill continued in the House of Commons, from the 16th of December, 1724, till the following 19th of March. It was at last passed by a majority of 56: the number for it being 139, and against it 83.

In the House of Lords, a petition was presented by the

* The following list has been taken from a report recently published by order of the common council of London:—

	No. of companies.		No. of liverymen.	
A.D. 1501	-	51	-	1,458
A.D. 1725	-	61	-	8,514
A.D. 1832	-	75	-	12,080

George I. mayor, aldermen, and commons, in common council assembled, against parts of the bill which they described as prejudicial and inconvenient; destroying the former qualifications of voters in the wardmote; and substituting in lieu of it, new, complicated and uncertain qualifications.

1724.

On the other hand, the major part of the aldermen petitioned in favour of the bill. It long remained in committee, and it was afterwards proposed to take the opinion of the judges—"whether the bill repealed any of the prescriptions "privileges, customs, or liberties, restored to the citizens "by the act of King William," and the motion passed in the negative.

Two protests were presented, one against the decision not to refer to the judges, upon the ground, that it might interfere with the rights confirmed by that statute: and the other against the general principle of the bill. Amongst the reasons against the bill, it was asserted, "that it created a "new constitution in several particulars, and was not "framed upon the ancient rights, proved or pretended to or "disputed on either side; but was a new model without due "regard to the antecedent rights, as claimed by either side, "and was a precedent of the most dangerous consequence "to all the cities and corporations of the kingdom." It concluded by expressing an opinion, that "the petition of many "thousand freemen of the city against the bill, ought to be of "far greater weight than the petition of 15 aldermen for it."

The bill received the royal assent, and the following is an extract of the preamble.

"That of late years great controversies had arisen in the city of London, at the elections of citizens to serve in Parliament, and of mayors, aldermen, sheriffs, and other officers of the city, and that *many persons having no right of voting, had unlawfully intruded themselves into the assembly of the citizens*, and given votes in violation of their privileges.

"That many wealthy persons not free of the city, did *inhabit* and carry on the trade of merchandise, and other employments within the city, and did refuse to become freemen, by reason of an ancient custom, restraining the freemen from disposing of their personal estates by will.

“That great dissensions had arisen between the aldermen and commons, of the common council, concerning the making ordinances in common council; which if not determined, might occasion great obstructions to the public business of the city.” George I.
1724.

“For remedy thereof, it was enacted, that in parliamentary elections, and those of mayors, sheriffs, chamberlains, bridge-masters, &c., and other officers, to be chosen by the *liverymen*, and upon all elections of aldermen and common councilmen at the wardmotes; if a poll should be demanded, the presiding officers should appoint a proper number of clerks to take the poll. And an oath was to be taken in all elections by the *liverymen*, that they were *freemen and liverymen*, and had been so for 12 months, and in the elections of aldermen or common councilmen, the voter was to swear that he was a *freeman and a householder*.” Elections.

Poll.

Liverymen.

Directions are also given for taking the poll: that of the liverymen being required to finish within seven days; and the wardmotes within three. Poll.

The sixth section requires, that the mayor should issue his precept requiring the masters and wardens of the livery companies to return two lists of the liverymen within three days, one of which was to be delivered to the candidates. Sec. 6.
Liverymen.

The seventh section relates to the election of aldermen and common councilmen, for the different wards, which is declared to belong to the *freemen paying scot*, as mentioned in the act; and *bearing lot* when required in their several wards. Sec. 7.
Wardmotes.
Scot and lot.

The houses of the *householders* were to be of the value of 10*l.* a-year at the least; and the voters are to be the sole occupiers, having been actually in possession for twelve calendar months. Sec. 8.

The *scot* is defined to be the church, poor, scavenger, orphans, and watch and ward rates: and such other annual rates as the citizens of London inhabiting there, should be liable to pay: except annual aids granted by Parliament. And any householders, who paid all those rates, or 30*s.* a-year to all or some of them, were to be taken as persons paying scot. Partners in trade were allowed to vote, paying Sec. 9.

Sec. 10.

- George I. their scot ; the house being of the yearly value of as many sums
 1724. of 10*l.* a-year, computed together, as there were partners.
- Sec. 11. That two inhabiting the same house, not being partners, each paying scot, and severally paying 10*l.* per annum for the house they inhabited, might vote.
- Sec. 12. A clause is added, giving the right of voting to those who were exempted by act of Parliament, charter, or writ of privilege from the payment of scot and lot.
- Sec. 13. Provisions are also made for appeals against the assessments.
- Sec. 14. By the 14th section, the persons excluded from voting are all liverymen who had not been upon the livery for the space of 12 calendar months before the election, and had not paid their respective livery fines, or had received them back ; and all wardsmen who had within two years before the election been discharged from paying their rates and taxes, or received alms.
- Sec. 15. The 15th section enacts, with the intent that no ordinance should be passed in common council without the consent of the *representative body*, according to the ancient constitution of the same—that no act should pass without the assent of the mayor, aldermen, and commons.
- Sec. 16. An exception is made as to the elections of common serjeant, town clerk, judges of the sheriffs' court, coroner, &c., who are to be appointed by the mayor, aldermen, and commons.
- Sec. 17. Persons becoming free of the city after the first of June, 1725, are enabled to dispose of their personal estate as they think fit ; provided, that if any freeman should so bequeath his property by will, or die intestate—his property should be distributed according to the custom of London.
- Sec. 19. And in the 19th section it was enacted, that the following words should be omitted from the freeman's oath :—" Ye shall know no *foreigner* to buy or sell any merchandise " with any other foreigner within the city, &c." And likewise, " Ye shall take no apprentice." The words immediately following shall also be omitted, that is to say—" *but if he be free born, that is to say, no bondman's son, nor the child of any alien,*" &c. &c.

In the recital of this act, it is stated, that “ many persons
 “ having no right of voting, had unlawfully intruded them-
 “ selves into the assembly of the citizens,”—which could not
 be said with more truth of any class than the *liverymen*.

George I.
 1724.
 Observa-
 tions.
 Livery-
 men.

It also recites the refusal of many wealthy persons to become free ; which it will be remembered is contrary to the ancient principles of the constitution. They *obliged* every man who was of free condition to be *enrolled* and *sworn*. The evil therefore here complained of, was one which the principles of the common law, had they been regarded, would have prevented.

The third complaint, of the dissensions which had arisen respecting the making of bye-laws, would also have been prevented if either of the ancient principles of the law, or the early practice of the city had been regarded.

The first enacting clause, relates to the taking of the poll in the elections of members to Parliament ; and some city officers : in none of which is it possible, according to the spirit and intention of the charters, and the nature of the ancient constitution of the city of London, that the liverymen could have had any right of interposing : and yet without any reason or evidence assigned for it, the liverymen are assumed to have the right of voting.

It has been already shown, how clear and distinct the usage was against the right, till the 50th year of Edward III.; when an attempt was made to introduce persons chosen from the *mysteries*, which was sanctioned by the interference of the king ; but in the same year, and from that time till the reign of Edward IV., the elections were by persons chosen out of the wards. In the ninth of Richard II., the men of the “ *mysteries* ” were expressly excluded ; after which, the usage continued in the same manner, till the seventh of Edward IV. The illegality of the order made by themselves at that period, to give them a pretence of interposition, has been already shown. From that time till 1650, their claim was, at the best, questionable and uncertain. At that period their pretensions were negatived, by the clear and express ordinance already quoted.

Livery-
 men.

George I. 1724. If they enjoyed any power of interposing from that period, it may fairly be referred to the usurpations of the times of Charles II. and James II. :—and subsequently, in all probability, to the effect produced by the publication of Dr. Brady.

It therefore appears surprising that the Legislature should have so readily assumed that the liverymen possessed this right; and it is now difficult to account for it. The constitution of the city appears, in the course of the arguments urged upon that occasion, to have been involved in much mystery and confusion.

It must therefore ever be regretted, that the Legislature should have sanctioned so great an innovation as this change of an ancient municipal institution: particularly with reference to so important a place as the metropolis, where the alteration might serve as a precedent for others.

The effect of the change was to introduce non-resident freemen; for as they were only required to be freemen, and not householders—they might reside at any distance: which was a just subject of complaint by some of the petitioners against the bill.

The oath of the liveryman, that he had been so for a year, was in analogy to the common law.

Sec. 7. The provisions relative to the elections of aldermen and
Wards- common councilmen in the different wards require, in the
men. pure spirit of the ancient law, that they shall be by the *freemen*, being *householders paying scot and bearing lot*.

Removed, at the present times, from the feelings and prejudices which probably guided those who adopted the provisions of this act, it is impossible to conceive how, with so plain a description of the real citizens of London—so consistent with the ancient general law—the particular usages of that city—and the decided cases upon the point—the legislature could, so unnecessarily and wantonly, have sanctioned the introduction of another class of voters:—the wardsmen being a class so easily ascertained, and so identified with the city:—while, on the contrary, the liverymen depended upon the capricious selection of the wardens

and masters of the companies, and they might be altogether foreign to the city and unconnected with it. George I.
1724.

It must not be overlooked, that in the clause of this act relative to the oaths, the most convincing confirmation is to be found of the position, that the right by *apprenticeship* was connected with *villainage*, and that such right ought now to cease. For in that part of the oath which relates to apprentices, it is directed, that for the future, the following words should be omitted: "If he be *free born, that is to say, no bondman's son.*" From which it appears, that the distinction originally was between those who were free, or bond born; and being no longer necessary, the Legislature directed it to be omitted from the oath. But in a passage in the *Liber Albus*, as late as the reign of Queen Anne, the "*liberos inhabitantes*" are spoken of; and they were clearly the ancient *liberi homines* of the common law. That term was also used in *Bristol* as descriptive of the jurors, as late as the sixth of George II.* Sec. 19.

Appren-
tices.
Villainage.

Liberos in-
habitan-
tes.

After this act, it is useless to inquire further into the constitution of London. This legislative stamp placed upon the prior usurpations effectually confirmed them, and prevented further discussion as to their legality.

The Reform Act has still further established the abuse, and provisions are made in it for making lists of the two supposed classes of *citizens*, the *liverymen* and the *freemen*; it has also given full effect to the mischief of non-resident liverymen, to the extent at least, of seven miles round the city.

Before closing the extracts as to London, the ancient precept to the alderman of the ward to hold his wardmote, should be noted. It speaks of the jury as being for the whole year—provides for the appearance of all who were required to attend at the wardmote—directs the watching and lighting of the wards, and that elections should be made of the common councilmen, constables, scavengers, beadles, and rakers. Ward-
mote.

Sec. 1.
Sec. 3.
Sec. 4.
Sec. 5.

Also that a *roll should be kept of the names, surnames,*

* See 2 Strange, 941, Ball v. Knight.

George I. *dwelling places*, professions and trades, of all persons *dwelling* within the ward, and within what constables' precincts they *dwell*; than which a better, and at the same time a more simple mode of enrolling the *householders* within the ward cannot be devised—the whole being placed under the superintendence of the *constables*.

- Sec. 8. The next section requires the constable to certify the name, surname, *dwelling place*, profession and trade, of *every person who shall newly come to dwell* within the precinct, *whereby the roll might be kept perfect, and the constable is*
 Roll. *for that purpose to make and keep a perfect roll.* Pointing out most distinctly the simple method by which the list of the citizens from time to time might be correctly perfected, from the returns made by the constable.

All innholders are directed, according to the ancient law, to give notice to the constable of every person who shall lodge or sojourn in his house more than two days, before the third day after his coming. Which the reader will remember is a provision recognized by all the early text authors upon the law.

The constable is also directed to give the same notice to the alderman of the ward, and householders are prohibited from lodging suspected persons, or those of evil fame.

- House- Sec. 10. The 10th section requires every constable, once in the
 holders. month at the furthest, and oftener if need require, to make search and inquiry what persons be newly come into his precinct, to *dwell, sojourn, or lodge.*

- Sec. 11. The 11th section states, that of late there was more resort
 to the city of persons evil affected in religion, or otherwise, than in former times; and therefore directs diligent inquiry if any persons be received to *dwell or abide within the ward, that is not put under frankpledge, as he ought to be by the custom of the city*; and whether any person hath continued in the ward for one year, being above the age of 12 years, and not *sworn* to be faithful and loyal to the king, in such sort as by the law and custom of the city he ought to be.

- Frank-pledge. Sec. 12. The beadles are to be assistant for this purpose; stocks, &c. are to be provided; as well as engines, &c. for the prevention

of fires :—the streets are to be kept clean :—huxters of ale ^{George I.} and beer are to find sureties :—the measures are regulated :—aliens are prohibited from holding offices :—and there are also provisions against vagrants and for the selection of the juries :—and all of them are directed to be given in charge to the wardmote inquest.

These articles are so directly connected with the common law, that they require no additional comment or illustration.

CHARTERS.

The only charters granted by George I., which are enrolled at the Rolls Chapel, are one in 1722, 9 George I. to *Henley-upon-Thames*; and another in 1724, 11 George I., to *Tiverton*.

The latter has been already given.* The former grants to ^{Henley.} the mayor, aldermen, portreeves and burgesses, power to elect a high steward, to be of the rank of a baron or knight; and that the government of the town should be confided to the mayor, 10 aldermen, two bridgemen, 16 burgesses, a recorder, town clerk, &c.

PARLIAMENTARY CASES.

As to the parliamentary decisions in this reign, it will be only necessary to observe, that in *Westbury*,† *Horsham*,‡ and *Beeralston*,§ the same effects followed which have been noted before, from substituting the *freehold owner* of the burgage, for the *actual occupier*. 1715. 1721.

In *Reading*,|| although the *freemen* of the corporation had before acted as *burgesses*, together with the *inhabitants*, the latter *only* were declared to be entitled to vote as burgesses :—a decision correct indeed in substance, though confused in form; because the declaration should have been against the right of the non-residents to be burgesses; and that the *inhabitant householders paying scot and bearing lot*, and *sworn* and *enrolled* at the *court leet*, should be considered as the burgesses. 1716.

* See before, p. 1587.

† 18 Journ. 154.

‡ 18 Journ. 172.

§ 19 Journ. 579.

|| 18 Journ. 453.

- George I. In *Litchfield*,* the freemen were required to be enrolled,
 1718. and to pay scot and lot.
 1720. In *Dorchester*,† the inhabitants were properly required to
 pay to the church rate, as well as to the poor, that being a
 part of the scot of the borough. And the same was decided
 1722. as to *Warwick*.‡
 1723. In *Calne*,§ the right was most properly declared to be in
 the “*ancient burgesses* :” although that determination was
 subsequently perverted to sanction a strange usurpation, by
 a small exclusive number of persons, not admitted into any
 corporation, but *sworn* at the court leet of another manor,
 14 miles distant. But to this place we shall have occasion
 to refer hereafter.

Besides the above decisions, there were others in which
 the *inhabitant householders paying scot and lot*, were, in
 effect, decided to be the *burgesses*, although the boroughs
 were incorporated.

LAUNCESTON.

1722. Petitions were presented against the return for *Laun-*
 Oct. 19. *ceston*|| by the candidates, and the *major part of the inhabi-*
tants within *the borough*; the latter stated, that the *right*
of election was in the *freemen*, and those who had served
legal apprenticeships with freemen of the borough, and none
others.
 1723. The report stated, that the petitioners’ counsel insisted, that
 March 13. the borough was first *incorporated* in the time of Philip and
 Mary; and that the right of election was founded on that
 Charter. charter;¶ which incorporated the mayor and eight aldermen,
 (all described as *inhabitants*;) and it gave them power
 Burgesses. to admit *inhabitants* to be *burgesses* or freemen; which were
 synonymous terms in the charter. They also contended, that
 the right of election was in the mayor, aldermen, and freemen,
 being *inhabitants* at the time they were made free, and not
 receiving pay of the parish.

* 19 Journ. 35.

† 19 Journ. 363.

‡ 20 Journ. 113.

§ 20 Journ. 273.

|| See before, pp. 368, 666, 971, 1181, 1205.

¶ This, according to the cases in Glanville, could not be the fact.

The sitting member's counsel insisted, that it was an ancient borough, and *before their charter sent members to Parliament* time out of mind; that the charter confirmed all their ancient rights and privileges, but *neither did nor could alter the right of election*,* which was in the mayor, aldermen and freemen, *sworn* before the mayor and aldermen, or the major part of them, whether such freemen were *inhabitants* or not at the time of admission.

George I.

1723.

Sitting member.

That the charter of Philip and Mary, granted *that the borough* should, for the future, for ever be *a free borough*; and *incorporated the burgesses* thereof, by the name of "the mayor and commonalty:" and all their ancient rights, customs, and privileges were confirmed, except their election of portreeves, who were abolished. .

Charter.

That the mayor, commonalty, and their successors, might admit such and as many of the most discreet men of the *inhabitants* to be *burgesses and freemen* of the borough, as to them should seem proper; with a power to remove any freemen or inhabitants guilty of offences within the borough. And that the mayor and commonalty might elect two burgesses to Parliament.

They also insisted, that the prescriptive right was evident, from the whole tenor of the charter, which began with recitals by *inspeximus*, of no less than *eight ancient charters*, seven of which were granted by former kings, viz. Edward VI., Henry VIII., Henry VII., Edward IV., Henry V., Henry IV., Richard II., and Richard, Earl of Cornwall; all which charters, and the liberties and customs contained therein, and all ancient privileges and immunities, whether by grant, custom, or prescription, were confirmed, except the election of portreeve.

They also produced returns of the first, second, and third of Philip and Mary, by the *mayor and burgesses*; of the 26th and 30th of Elizabeth, by the mayor and *OTHER burgesses*; and of the 16th of Charles I., by the *mayor and free burgesses*.

They also offered to prove that *foreign burgesses* had joined

Foreign burgesses.

* See before, Glanville.

George I. in returns to Parliament, since the charter of Philip and
 1723. Mary; which the petitioners' counsel admitted to have been done *in and since the reign of King James II.* But insisted, that the foreign burgesses had no right, and that this *charter of Philip and Mary was the first charter of incorporation of the borough*, and the only one under which the burgesses acted; and observed that all preceding grants, or charters of confirmation of privileges, were none of them *charters of creation or incorporation.* The counsel for the sitting members called witnesses, who said they knew, in all elections, for *50 years past*, the *out-freemen voted*, and were never objected to; though they did not live *in* the corporation* at the time they were made free.

Evidence of reputation was also given, that *out-burgesses had voted*, and were always allowed to be as good votes as the in-burgesses, and enjoyed the same privileges; and the out-burgesses were never denied voting, in the memory of man: and particularly the agent for Sir William Pendarves, in his election in the year 1714, insisted on the right of the out-burgesses to vote, but owned he was not at the poll.

In answer to which it was proved on the other side, that at Sir W. Pendarves' election, Sir W. objected to the out-burgesses; that he took the poll, and marked the out-burgesses as they came up, but did not take down any of them upon Sir W.'s poll, but said, he could not tell whether they were taken or not by the town clerk, who took the poll for the mayor.

Right. The committee resolved, that the right was in the mayor, aldermen, and *freemen, being inhabitants at the time they were made free, and not receiving pay of the parish.*

Seventeen of the voters for the sitting members were objected to, as not being inhabitants *at the time they were made free*; and twelve were admitted to be such: one was objected to as a *sojourner*, and not an inhabitant.

1684. To prove a right to the freedom by servitude, it was shown

* This is another instance of the loose application of the term "corporation," for "borough."

that there had been a mandamus in 1684, to admit a person as freeman, who had served a seven years' apprenticeship, and therefore the corporation, after advising together, admitted him; and it was also proved, that after that time none were denied, till of late the corporation have taken upon themselves to *refuse* all but their own party, and to swear those they admitted, never to be against the mayor and aldermen. It was also proved, that there was never any refusal of such *freemen*, till the late difference about *members of Parliament*; and Pearce said, upon an election, 24 years since, the mayor admitted to *freedom*, *persons that would promise to vote as the corporation would have them*, and refused all others.

George I.

Manda-
mus.

And it was proved that one Tingcombe had often demanded *his freedom of the corporation*, and was always refused, because he was not of the right party, and for no other reason; for he produced his indenture, and they all knew of his service.

That it had been usual for the *grand jury* to *present persons*, who had served seven years' apprenticeship, for not taking up their freedom; and upon such presentment they were admitted, or amerced for their refusal.

Grand
jury.

The sitting member's counsel denied, that servitude gave a right to *freedom in this corporation*, other than for exercise of trade, and enjoyment of particular *liberties and immunities*, but not to vote for *members of Parliament*, which depended upon the charter, as before stated; and insisted, by the charter and constitution of the borough, the *admission of freemen* is perfectly discretionary in the *mayor and aldermen*, who *may admit or refuse, as they please*.

The petitioners' counsel agreed, the *mayor and aldermen* had a *discretionary power* to admit *inhabitants who were* not entitled; but denied they could exclude such as had a right, by serving apprenticeships.

On the part of the sitting member, witnesses were called to show, that the consent of the mayor, and majority of the aldermen, was necessary to admission to freedom; and that there was no right acquired by servitude, or otherwise,

George I. nor any ways to gain freedom, but by consent of the corporation.

Evidence was also given to show, that the five who were objected to, as not being *inhabitants* at the time they were made free, in point of fact lived within the borough.

For the petitioner it was justly insisted, that in admitting freemen, the mayor acted not judicially, but *ministerially*.

It is impossible not to observe from the above evidence, which was laid before the committee, that at that time, and from the reign of Charles II., the period at which such proceedings were openly sanctioned by the crown, that the corporation had persevered in a long system of violence and usurpation.

This case affords another instance of the introduction of *non-resident freemen*, after the interference of *James II.* with the corporations; as well as the mischiefs resulting from the corporation being allowed to exercise their own will in the admission of the freemen, instead of their being presented by the *grand jury* at the *court leet*, which appears to have been the ancient practice of the borough, in the same manner as it was in East and West Looe; and from the entry it is evident, that persons who were qualified to be burgesses were *presented* by the *jury* if they did not take up their freedom, as in the former cases of Yarmouth, Ipswich, and Lynn. However, the discretionary power of the mayor and aldermen to admit or refuse as they pleased, was peremptorily insisted upon on the one side, and conceded on the other as to persons who were not entitled.

The real grounds and nature of the discretion which the mayor and aldermen possessed, have been before so fully stated, that it is unnecessary here to repeat them.

1734. In the seventh of George II., upon another report touching
 Right. an election for this borough, the committee resolved, "that
 " the aldermen of the borough ought to be elected out of the
 " legal freemen of the borough only." And the resolution
 stated above, of 1723, being then read as the last determination under the statute, no further inquiry could arise as to the burgesses of this place.

HONITON.

In the 10th year of George I. there was a decision respecting the borough of Honiton, to which we have before referred,* by which that class of voters called “potwallers” were in effect declared to be the burgesses. 1724.

This absurd and anomalous right demands a few remarks as to this borough and its burgesses.

We have seen that it was not described as a borough in Domesday, nor does it appear when it was created. It, however, returned members to Parliament in the 28th of Edward I., (which is the first mention of it as a borough,) and also in the fourth of Edward II. It afterwards ceased until 1640, when it was restored; Mr. Maynard having reported from the committee of privileges, “That in the 28th of Edward I. the town of Honiton did send two burgesses to Parliament. It further appeared, as a concurrent proof, that this town, being still a borough, did pay the charge of borough towns; tenths, and not fifteenths.” 1299.

In 1701, upon a petition of Sir Rowland Gwyn against Sir Walter Yonge, the right of election was *agreed* to be “in the “potwallers not receiving alms.”

The parliamentary rights of this borough came under discussion in 1710, in consequence of a petition being presented from the *potwallers* and inhabitants, stating, that the right of parliamentary election had ever been in all the *householders inhabiting* within the borough, who were commonly called *potwallers*. That at the last election, the portreeve polled all such *potwallers*; without making any distinction in the poll book, who paid *scot* and *lot*, and who not: nor was any objection then made to the *potwallers'* right. But the portreeve, contrary to all returns before made, had returned Sir William Drake and Mr. Sheppard, as chosen by those paying *scot* and *lot*; and Sir William Drake and Sir Walter Yonge, as chosen by the *populace*. 1726. Potwallers.

To prove the right of those paying *scot* and *lot*, five persons stated, that they had known the borough 30, 40, and *Scot and lot.*

* See before, p. 165.

George I. 50 years : that at one election, 40 years since, the *potwallers* were refused, and none but *scot* and *lot* voted then : that at all elections since, the potwallers have claimed a right to vote : and, at an election in 1679, upon a report being spread, that they would be refused, they pulled down the place built to take the poll in, and the balcony of the house to which the poll was adjourned : that since that time they have been admitted for peace sake, but the returns were made by the *scot* and *lot* men only ; and that they had been told by several ancient men of the borough, who are now dead, that the right of election was in the *scot* and *lot* men only.

To prove the right in the potwallers, the returns of 1661, 1679, 1680, 1688, and 1705, were produced ; and several of those who signed the returns were potwallers—that potwallers voted in 1661, and in all elections since, and were not excepted to, if they did not receive alms—performed watch and ward—and served the town offices.

Watch
and ward.

The Journal of 1701 was produced, for the purpose of proving that the right had at that period been agreed to be in the potwallers not receiving alms. Upon which evidence the committee resolved, “ that the right was in the *inhabitants* of the borough paying *scot* and *lot*, and in the *potwallers* not receiving alms.”

Right.

Amendments were subsequently proposed to leave out the words—“ and in the potwallers not receiving alms,” and thereto add the word, “ only,” which was agreed to, and the resolution and amendments were approved of by the House.

1724. In 1724, the right again became a subject of controversy, it being argued, that Honiton was a borough by prescription (which might be doubted), and had, time out of mind, sent members to Parliament (which was certainly untrue).

Petitioners. The *petitioners* insisted, that all the inhabitants *potwallers*, that is *every inhabitant in the borough who had a family and boiled a pot* there, had a right of voting in elections to Parliament.*

This was denied by the other side, who insisted, that those only had the right who paid *scot* and *lot* within the borough.

* See before, observations on Taunton and Tregony, p. 1226.

To prove the petitioners' case, two persons were called, one of whom spoke for 24 years, the other for 40, during which period, until 1711, *potwallers* were constantly admitted to vote, and had never been objected to unless they received alms. That it had always been understood in the borough, that the potwallers had a right to vote equally with the rest of the inhabitants, whether they paid scot and lot or not, and used to sign the returns.

George I.

1724.

Potwal-
lers.

The Journal of 1701 was also produced.

1701.

Against which evidence the Journal of the third of February, 1710, was read, determining the right "to be in the inhabitants paying scot and lot only."

1710.

Upon which the committee resolved, "that the right was "in the *inhabitants housekeepers* within the borough, commonly called potwallers, not receiving alms:" to which the House agreed.

Right.

CASES.

A few legal authorities will be necessary to complete the extracts for this reign, particularly some relative to the illegal claims of the *non-residents* to be burgesses.

Non-
residents.

The first relates to the important question of the proper grounds upon which an officer or burgess might be removed.

A mandamus was issued to the mayor and common council of the borough of *Carlisle*, to restore one John Sympson to the office of a capital burgess of the borough.

1721.

Carlisle.

They return the charter of incorporation, with a power to the mayor and aldermen to remove any capital burgess for any misdemeanor; and then set forth an amotion by them for *bribery* at an election of the mayor.*

The chief justice and *Powys* held, that there ought to have been a *previous conviction*.

But *Eyre* and *Fortescue*, justices, said, that this offence, being *plainly against his duty and oath of a burgess*, the corporation might remove him without conviction.

* *Rex v. Mayor and Aldermen of Carlisle*; Fort. 203; 9 Co. 99; Carth. 173; Lord Raym. 1283; 1 Burr. 339; 2 Burr. 723; 4 Burr. 1999.

George 1. And they all agreed that a burgess may be removed for an
 1721. offence for which no indictment will lie.

Chief-justice—"If a burgess be convicted upon an indictment for an offence at common law, this court may order, as part of the punishment, that he be disfranchised."*

But *Eyre* and *Fortescue*, justices, denied it.

Not only should bribery be a ground of amotion from any office, but it should also be a total ground of disqualification for all purposes. For till this offence is suppressed, all other regulations, either for parliamentary or municipal elections, are nugatory, and must be framed and executed under great difficulties. Nor will bribery ever be effectually prevented till the powerful and decisive aid of public opinion is brought to bear upon the subject. Whenever a person who is known to be guilty of receiving a bribe, stands disparaged amongst his neighbours, and has the finger of scorn directed against him, no further law will be necessary to prevent the crime: and till that effect is produced, the wisest and strictest laws will be evaded, and ineffectual.

Tenterden. A rule was made for the mayor of *Tenterden*, to show cause why an information should not go against him, for *taxing several persons who lived out of the corporation*, to be contributory to building a bridge, and other charges within the corporation.†

1722. The mayor showed for cause, that though the persons thus taxed, *did not live WITHIN THE CORPORATION*, yet they *dwelt within the liberties* thereof, and were entitled to the like privileges as those who lived *within the corporation*; one whereof was to be *exempted from all taxes in the county at large*; so that it is reasonable they should be *contributory to*

* In the case of the *King v. the Mayor and Aldermen of Carlisle*, the solicitor-general, in the course of the argument, upon *Braithwait's case* being cited, stated, that it was a strange case, wherein the judges asserted the power of the *King and council to disfranchise members of corporations* by their order; and even to pull down the walls of a town, so it might be they went upon such an order. And every body knows matters of prerogative went very high at that time. He also said, that no record of that case was to be found.

Chief-justice.—I am very glad of it. I can have no regard to any opinion that was given when judges were worked up to so extravagant a pitch, as to assert such a doctrine.

† The *King v. the Mayor of Tenterden*, 8 Mod. 114.

*the charges within the corporation,** when they had the benefit of the privileges thereof—besides, the tax now in question had been paid by such *out-dwellers* time out of mind.

George I.
1722.

But the court directed, that this matter should be tried upon an information, and that for two reasons:—1st, because *a single person might not be able to contest this matter in an action against the whole corporation*:—2ndly, because if a verdict should pass for or against such single person, it would not end the contest which might happen against the rest.

In this case, the distinction between the *borough* and the *county at large*, which has appeared so clearly from the earliest periods of our history, is distinctly marked, as well as the reasonable ground of exemption from the county charges, upon the consideration of paying them within the borough. But the whole of those reasonable usages were thrown into confusion by the allowance of out-dwelling burgesses.

In an information in nature of a *quo warranto*,† against Jones and Powell, for pretending to be *burgesses of Brecknock*, in Wales, and to show by what authority they claimed to be burgesses, &c., upon not guilty pleaded, the cause came on for trial at the assizes in Hereford, and upon hearing the evidence, the counsel for the king desired that the matter might be found specially: for that it appeared by the *charter* of this *corporation*, that the burgesses, and all other officers thereof, should be chosen *de inhabitantibus*, and that the defendants, Jones and Powell, *were not inhabitants of Brecknock*.

1723.
Breck-
nock.

But there being evidence that the *usage* had been *against the charter*, the jury gave a *general verdict* upon the *usage*, viz., that the defendants were not guilty.

And now it was moved to set aside this verdict, for two reasons:—

First. Because it was given against evidence.

* This is a repetition of the erroneous application of this word, before noted in the Launceston case.—See before, p. 2006.

† The King, v. Jones, 8 Mod. 201.

George I.

1723.

Secondly. Because the jury refused to find a special verdict, which they ought to have done when it was required.

And because of the difficulty of the case, this question was referred to *all the judges of England*—Whether a verdict by which the defendant is found “not guilty,” on an information in nature of a quo warranto, could be set aside, and a new trial granted.

And the judges were equally divided, two against two in each court, so that not one court was unanimous in opinion of either side; but *six of them were of opinion*, that the verdict might be set aside; and *six were of a contrary opinion*,

And it being now moved again to set aside this verdict for the reasons before mentioned, &c., Pratt, C. J. said—If this is *not to be looked on as a criminal prosecution*, I should readily grant a new trial. This lately hath been made a question, and was referred to all the judges, who were equally divided in opinion, six against six, and each court was also divided. I was for a new trial.

Fortescue, justice.—I was against a new trial; and am so still. *Indictments are sometimes used only for trying a right*, and yet it was never pretended to grant a new trial in them. It is objected, that this is a mixed sort of a prosecution, and not entirely criminal. If so, still it is criminal. It is objected, that the fine imposed is always small, but it may be large.

Raymond, justice.—These *informations are only methods to try the right, and ought to be looked on as civil actions*; and though a fine is imposed, yet that makes no alteration; for sometimes in actions confessedly of a civil nature, a fine is set, as in actions of trespass *vî et armis*. This is my present opinion; but I would advise.

The court was of opinion, that the verdict was against law; for the *charter* is to be understood *negatively de inhabitantibus, and so destroys the usage*; and where a jury bring in a verdict *against law, agreeable or not agreeable to the direction of the judge*, the verdict ought to be set aside, &c.

1724.
Whitchurch.

One Hunt was *bailiff of the corporation of Whitchurch*,* in Hampshire, in the year 1722, at which time Batchelor was

* The King v. Butler, 8 Mod. 349.

chosen mayor by the *jurors* summoned by Hunt; and the mayor continued him bailiff for the next year, viz. for the year 1723, being the year of his mayoralty.

George I.
1724.

Thereupon an information in nature of a quo warranto, was granted both against the mayor and Hunt, suggesting that *no man could be mayor or bailiff there who was non-resident*, and chosen by non-residents, as the jury were; against which the inhabitants protested as contrary to their ancient usage; and that both the *mayor and bailiff* were *non-residents*, and therefore had usurped a franchise.

Non-residents.

The counsel for the defendants showed for cause against this rule, that all the officers of this borough are to be constantly chosen by *freeholders* thereof; and that some of the *inhabitants* who were freeholders, were *summoned* to be of the *JURY*; but they refused to appear, pretending they would not serve with those who were *not inhabitants* of the borough, but *out-dwellers*, and therefore excluded from being of the jury; and thereupon others were returned who would serve.

Freeholders.

That ever since the year 1641, the *out-dwellers*, who had freeholds in the borough were returned *jurymen*, which appeared by the entries made in their borough-book, and such *out-dwellers* had *served in all the offices* thereof.

Out-dwellers.

That Whitchurch is an ancient *borough* by *prescription*, and that the *jury* thus impannelled, did not serve in a *court leet*, but in the *borough court*; for if it had been to serve in a *leet*, then it must have been by *inhabitants*; but in a *borough court*, or *court baron*, none but *freeholders* are to be of the jury, which freeholders might be *out-dwellers*, so as they had a freehold within the borough. That all the jury had freeholds in the borough, and by such a *jury* assembled at a *borough court*, the defendants were lawfully chosen.

Jury.
Leet.

Borough court.

But the rule was made absolute, by two judges against one, there being but three in court; for this being a matter of right, it was fit to be tried by a jury, who are the proper judges of evidence.

The court at another day, was moved for a trial at bar, upon some affidavits that the *freehold to the value of a thousand pounds might come in question*.

George I. But it was *denied*, for no other reason, but that it was a
 1724. *borough cause*.

And at the trial, a *verdict* was *found* for the mayor, that he was an *inhabitant resident*; and against Hunt, that he was *non-resident*; and thereupon the mayor named one Page to be *bailiff*.

The *question* now was,—Whether the mayor could name a new bailiff; because, by the constitution of the corporation, a bailiff, duly elected, is to continue in his office for a year, and until another is duly chosen: and Hunt was never duly chosen, because he was *non-resident*.

This being a controverted point, another information, &c., was granted to try it.

One of the usurpations which occurred so frequently in the boroughs, seems to have been attempted to be justified in this case, by the assertion, that these were proceedings at a *borough court*, and not a *court leet*.

But the whole current of authorities from the earliest
 Leet. times, is decisive to show that this was a *court leet*, and not a borough court. For all such officers were by the common law required to be *presented* at the *court leet* by the *jury*, and *sworn* there; the only court at which such oaths could properly be administered.

The other borough courts were either courts baron, not having juries, but homages; or courts of civil jurisdiction, whose functions were altogether of a different description.

IRELAND.

1717. An act was passed at this period, "entitled an act for
 Galway. better regulating the town of *Galway*, and for strengthening the Protestant interest therein," in which the following
 Freemen. clause relative to the admission of freemen occurs: "That
 "no person shall be elected mayor, or sheriffs, or common
 Inhabitants "councilmen, who shall not be an *inhabitant* within the
 "town, at the time of being elected; and that hath not been
 "resident for the space of *one whole year*, before such elec-
 "tion; and that all persons who profess themselves of any
 "trade, mystery, or handicraft, that do or shall *come* to

“ *reside* in the town of Galway, in order to follow their
 “ respective trades, shall be *free* of the town and corpora-
 “ tion, and also of that company or corporation to which
 “ their respective trades belong, without paying any thing
 “ for such freedom; and shall continue freemen of such
 “ company or corporation *as long as they dwell* in the town,
 “ and no longer.

George I.
 1717.
 Galway.

“ Provided, that no persons are to have the benefit of their
 “ freedoms, unless they have been professed Protestants for
 “ seven years, or upwards, next before their demanding their
 “ freedoms, pursuant to this act; and shall also take the
 “ usual oaths of freemen; and also the oaths of allegiance,
 “ supremacy, and abjuration, and make and subscribe the
 “ declaration against transubstantiation, before the mayor of
 “ the town, who is required to administer the same.”

CORK.

We find at this period, several bye-laws agreed to at a
 court of d'oyer hundred for *Cork*,* which commence with a
 recital, that “ for some time past the *common council alone*,
 and sometimes a few members thereof, had assumed a power
 to dispose of the public money and issue their orders for the
 same, to such uses as they thought proper, without the con-
 sent of, or consulting the *commonalty*; and forasmuch as the
 due application of such money is of general concern to the
 whole community; it was enacted—

1721.

“ That from thenceforth, none of the public money should
 “ be issued, unless it should be first proposed and consented
 “ to by the mayor, sheriff, and *commonalty*, in open court of
 “ d'oyer hundred assembled.

“ That the mayors of the city, for some time theretofore, had
 collected several petty duties from the freemen at large,
 contrary to their rights and franchises; which duties, and all
 pretence of right to the levying the same from the freemen,
 from thenceforth should be abolished.

“ That for some time past, the common council had assumed

* It appears that previous to their being past, the *pannel* of freemen was called over, and each freeman that was present gave his assent thereto.

George I. a power of taking up money at interest, for the pretended
 1721. use of the corporation, without the consent of the other free-
 Cork. men and members thereof: whereby the revenues of the city
 were often loaded with unwarrantable debts.

“And as this is a matter of general concern to all the constituent parts of the whole community, and ought, therefore, to have the most public consideration and sanction, for avoiding the like mischief for the future, and that the city might not thereafter contract any debt, but what should be judged absolutely necessary, and receive the most public assent, *it was provided*, that no money should be borrowed at interest for the use of the corporation, unless the consent of the mayor, sheriffs, and commonalty, was first had in open court of d’oyer hundred.

“That all unnecessary law-suits might for the future be avoided, and that it might not be in the power of a few members thereof, alone, without the consent of the rest, to engage the corporation therein, and to make use of the public money for carrying on such suits, whereby great mischiefs and inconveniences had arisen; it was provided, that from thenceforth, no law-suit should be commenced or defence taken, on the part of the corporation, unless the same should be first consented to by the mayor, sheriffs, and *commonalty*, or the major part of them, in open court of d’oyer hundred.”

A recital then occurs, “that by the charter and ancient
 Ward. usage of the city, the aldermen of the *ward*, and all the several officers and ministers of the corporation, used to be elected in open court of d’oyer hundred, by the mayor, sheriffs, and commonalty, there assembled: But that for the future, whenever any vacancies should happen in any of the places of the aldermen, or in either of their officers or ministers, they should be chosen by *public consent* in open court of d’oyer hundred, and not otherwise.

Freemen. “That for the future, no freeman at large should be made, who should not first petition the mayor, sheriffs, and common council, and should after be approved of in open court of d’oyer hundred. Provided, that nothing therein should be

any ways construed to extend to any persons of great distinction, who should happen at any time to be in the city, and to whom the council should think fit to make a present of their freedom—such person or persons, however, not being under the degree of an esquire; nor should it extend to bar such persons as had a right to their freedom, by having served seven years as an apprentice to a freeman at large, or by being the eldest son of such freeman.

George 1.

1721.
Cork.

“That the *commons* having been at a considerable expence in the defence of the rights and privileges granted them by charter, and in opposing the arbitrary proceedings of those that endeavoured to deprive them of their rights, amounting to the sum of two hundred and twenty-five pounds, twelve shillings, sterling—it was ordered, that they should be paid out of the public revenues of the city.

Commons.

“That several members of the common council of the city had of late (through refractoriness) often neglected or refused to meet and attend at the council chamber, according to the summons duly given, requiring their attendance; and that such visible refractoriness giveth just reason to fear, that several may likewise hereafter neglect or refuse to appear and give attendance, on such due summons as the mayor may *find necessary* to issue, which might very much retard the necessary and lawful proceedings in all affairs belonging to the city, and also be attended with numerous other evil consequences, if not timely provided against.” And therefore powers are given to remedy the grievance.

Common
council.

“That notwithstanding the freemen were by charter exempted from all tolls, taxes, murage, pavage, pontage, and kavage: it had of late been attempted to establish several customs of collecting gatage, and other taxes, from the freemen, with a design, in process of time, to perpetuate the same on them by pleading the force of such customs equal to laws against them.* Therefore it is enacted, by the mayor, sheriffs, and *commonalty*, in court of d’oyer hundred assembled, that all taxes and gatage theretofore collected from

* See post. temp. Geo. IV., Truro case.

George I. freemen at large, for any goods of their own property, or
 1721. which was by such freemen lawfully bought and contracted
 Cork. for before the same entered the liberties of this city, were
 collected contrary to charter or law; and that, therefore, any
 pretended custom or authority for collecting such taxes from
 freemen at large, should from thence be null and void."

The few following facts will close all that is necessary to
 be inserted as to the city of Cork.

1726. "That great inconveniences having arisen by the not enter-
 Appren- ing and *enrolling* the several *apprentices'* indentures of this
 tices. city, whereby several indentures have been ante-dated, and
 thereby several apprentices have not been skilled in their
 professions: it is ordered, that all apprentices' indentures
 whatsoever, be entered and *enrolled* in the town clerk's office,
 at the time of entering into, and perfecting such indentures,
 and witnessed in the office."

1728. Upon reading the several orders relating to the election of
 Ward. alderman of the *ward*, it was ordered, "that the manner of
 "election of alderman of the *ward* for the future should be,
 "that all the aldermen for the time being, that were not jus-
 "tices of the peace or aldermen of the ward, should be set
 "upon the election, and whichever appeared to have the ma-
 "jority of the suffrages or votes of the *freemen* in *open*
 "court of *d'oyer hundred assembled*, should be declared to be
 "duly elected alderman of the ward."

The elections of the aldermen and common councilmen of
 London, so recently before the reader in this reign, cannot
 fail to suggest a comparison with these ward elections in
 Cork, as well as the previous regulations for enrolling the
 indentures of apprentices.

George II., in the eighth and 21st years of his reign,
 granted two charters to Cork, one constituting all mayors
 upon their departure from office, justices of the peace; the
 other granting two fairs.

1772. By a special verdict of this date, it appears that the *eldest*
sons of freemen, being twenty-one, were entitled to the free-
 dom; but that it was immaterial whether the father was
 living or not when the son became 21.

And one Peter Simon was admitted in the 47th of George ^{George I.}
 III. to the freedom at large, under the statute, upon pay- ^{Cork.}
 ment of 20s., being a Protestant stranger.

GEORGE II.

STATUTES.

The first material statute to be considered in the reign of ^{1729.}
 George II. is the *Bribery Act*, in the midst of which, after ^{Cap. 24.}
 the oath directed to be taken by the returning officer, which
 is contained in the third section*—and before the declaration
 as to the effect of falsely taking that oath, which is in the
 fifth—the fourth is interposed, declaring that “such votes
 “shall be deemed to be legal which have been so de- ^{Last deter-}
 “clared by the last determination in the House of Commons ; ^{mination.}
 “which determination is directed to be final to all intents
 “and purposes whatsoever, any *usage* to the contrary not-
 “withstanding.” Nothing else in the act relates to the same
 subject; and there is therefore scarcely a specimen in the
 whole statute book of a provision thrust in so inopportunistly
 into the body of an act relating to other matters.

It requires some explanation, which can easily be supplied.

This clause was introduced as an amendment in the House of Lords ; who also increased the penalty from 50*l.* to 500*l.*, and made the act in other respects more effectual.

The fourth section, however, was not pleasing to the House of Commons ; but satisfied as they were with the rest of the bill, they adopted the amendment rather than run the risk of losing the whole measure ; and the question for agreeing with the amendments made by the Lords was carried in the affirmative by a majority of two voices only—91 to 89.

The effect of the clause was in substance to make that

* 2 George II., cap. 24.

George II. provision general which the statute of William III.* had enacted only as a direction to the returning officer: and forming into a legislative act the effect of the resolution of the House, excluding all evidence contrary to the last determination. It had also the effect of sanctioning, without any inquiry as to the justice or equity of the last determinations, all the varieties of rights, and the anomalous usages, which had previously existed—most unreasonably perpetuating those usages, where there happened accidentally to be a determination, but leaving open to dispute those places where there happened to be no decision.—A principle which from necessity must introduce a variety of rights, and perhaps some contrary to other determinations, where, nevertheless, the facts might be the same. Nor was this the only inconvenience resulting from this enactment; it also contained this inconsistency:—a usage, however short, which had been sanctioned by a decision of the House of Commons, was to be supported—whereas, if there had been a usage of ever so long a continuance, subsequent to the determination, it was to be disregarded; as if, for instance, there should have been a decision in the reign of James I., when the determinations are preserved, and there had been a usage contrary to it till the reign of George III., yet a committee would be bound to disregard that usage: a consequence very inconsistent with the general disposition to support the doctrine of usage.

NORWICH.

1730.
Cap. 8.

In the third of George II., an act was passed for the better regulation of elections in the city of *Norwich*, and for preserving the peace, good order, and government of the city. It recited that many controversies† had arisen at the *elections of citizens to serve in Parliament, and of mayors, sheriffs, aldermen, and common councilmen*, touching the legality of votes of many persons; that the time appointed by the charter was not sufficient to elect so great
Wards. a number of *common councilmen for each great ward*, as are

* See before, p. 1845.

† Stat. v. 6, c. 8.

thereby yearly directed to be chosen, when such elections George II.
1730.
 happen to be controverted. That great dissensions have
arisen between the mayor, sheriffs, and aldermen, and the
commons of the common council, concerning the making
ordinances in common council or assembly of the representa-
tive body of the city, which had often obstructed the public
 business. Representative.

For remedy of which grievances, oaths are directed to be tendered at the elections; and the votes of those refusing to swear, are to be disallowed.

Three common councilmen for each great ward, are to elect the remaining number of common councilmen—the vacancies are to be filled up in 48 hours after notice—none but inhabitants are to be chosen sheriffs—no act to be valid without the assent of the major part, &c.,—the mayors are to nominate the officers as customary—and a penalty is enforced on absence from the quarterly assemblies.

It should be observed, that this is a distinct legislative recognition; that the common council of Norwich was a *delegated and representative body*, as the common council of Delegated.
 London.—A circumstance material to be remembered hereafter, when the modern Wycomb case, of the king and Westwood, comes under consideration.

There is also another statute in the ninth of George II., 1735.
 relative to Norwich; which recites,* that anciently the chief manufacturers in the city of Norwich, and the makers of russets, &c., were by an act in the first and second of Philip and Mary, obliged to become *freemen*; by means of which, there was a constant supply of able magistrates: but the manufactures having been for several years disused, and others introduced in their stead; by which the offices of magistracy often fall to persons who are not the chief manufacturers, or the most substantial *inhabitants*; and frequent disorders happen in their elections, occasioning great riots. For remedy of which mischiefs and inconveniences, and for preventing the same in future; it was enacted, that all persons who were *manufacturers or makers of any sort of*

* Statutes, vol. 5, 434, c. 9.

George II. stuffs, &c., who are not journeymen or servants for hire ;

1735. master weavers, and master wool-combers, and persons dealing or trading as such, or employing servants or journeymen in any such manufactures, or having any interest in such manufactures, *inhabiting or living in the city of Norwich, shall be made free of the city, and admitted freemen thereof ;* (that is to say,) *all persons inhabiting or living in the city or county of the same, now being such manufacturers, shall upon their request to be made at any court of mayoralty or assembly of the mayor, sheriffs, citizens, and commonalty, be admitted and made free of the city, paying only 21 shillings for their admission and freedom : and all manufacturers who hereafter shall be living or inhabiting in the city, being foreigners, shall upon their request to be made at any assembly of the corporation to be holden for the city, be admitted and made free ; paying a sum not exceeding 5*l.*, upon taking the usual oaths.*

Any persons (*servants and apprentices* during their service excepted) who shall be such manufactures, not being admitted and made free, shall, after the 21st of June, 1723, forfeit 10*l.* for every calendar month.

1746. That all persons elected to the office of mayor, should be
Cap. 28. excused therefrom, if they swear they are not worth 2,000*l.* over their debts ; and upon payment of a fine of 50*l.* : or, if they swear they are not worth 3,000*l.* over their debts, upon payment of a fine, shall likewise be excused.

1745. In the 19th of George II., an act was passed for regulating the election of members to serve in Parliament, for that class
Cities, &c. of *cities and towns* frequently referred to before, which were
Counties of themselves. *counties of themselves* : and it seems erroneously to have assumed, that the 40*s.* freeholders had a right to vote for those places ; which, for the reasons we have given before, could not be the case—unless they were altogether treated as counties, and the right of the burgesses abandoned ; because the statute of Henry VI., which creates that qualification, is in the negative, and excludes all other right of voting. And if that statute applied to these cities and towns, no

other right ought to exist within them. The truth seems to have been, that it was never intended to have such an application; and it is strange that this statute should have proceeded on a contrary assumption — particularly as it has since been decided, that other general statutes, which relate to counties in general, do not apply to these peculiar and inferior county jurisdictions.*

George II.

1745.

WESTMINSTER.

. A statute of the 29th of George II., for the appointment of constables in *Westminster*, recognizes the *impannelling*, by the Dean of Westminster, or the high steward, or his deputy, calling to his assistance the *burgesses* of the city and liberty, if the dean, his high steward, or deputy, shall deem fit, of 40 substantial *householders*; out of whom they are to nominate 30 to be the *leet jury* for the year—taking care that one or more be nominated out of each of the parishes; and they are to be sworn to *present* to the court, proper persons to be chosen and appointed constables for the year next ensuing—that is to say, for St. Margaret's, 28; for St. John's, 8; for St. Martin's, 28; St. George's, Hanover Square, 24; St. James's, 28; St. Anne's, 16; St. Paul's, Covent Garden, 12; St. Clement's Danes, 12; St. Mary le Strand, 4. Out of which number, the court shall, in the manner and proportions before directed, appoint 80 to be constables, to serve for the city and liberty. *Fines* are imposed upon persons *refusing* to appear to execute the office of *jurymen* and *constables*, they being called upon to serve only once in seven years. A high constable is also to be appointed for the year; but none to serve for more than three years together.

1756.

Cap. 25.

Westminster.

Burgesses.

House-

holders.

Leet jury.

And in the 10th section of the statute, reciting, that obstructions in the public ways, and other annoyances and offences contained therein, are partly owing to the want of a sufficient power to *compel* persons to take upon them the office of *jurymen*, to present nuisances and other offences, it was enacted, that the dean, or high steward, or his deputy,

Sec. 10.

* See *Rex v. Haythorne*, 5 Barn. & Cr. 410.

George II. the two chief *burgesses* of Westminster, and the other *burgesses*, for the time being, or any five of them, (whereof the dean, high steward, or his deputy, or one of the two chief *burgesses*, should be one), are twice in the year to issue their precepts to *impanel* and return 80 substantial *householders* and traders, *residing* and *dwelling* within the parishes of Westminster, in the proportions before mentioned; out of whom they are, at the court, to nominate and appoint so many as they shall think proper, not exceeding 48: taking care that one or more be nominated out of each of the parishes: and they were to be called the “annoyance jury,” and were to take the oath prescribed by the act.

1756.

House-
holders.Annoy-
ance jury.

The duties of this jury are pointed out in the statute:—which, amongst other things, includes the supervision of weights, balances, and measures; and provision is also made that they shall not serve more than once in three years.

It appears, therefore, that as the whole city of London is under the jurisdiction of the courts leet or wardmotes—so also that wealthy and important part of the rest of this great metropolis, which is included in the parishes of St. Clement’s Danes, St. Martin’s-in-the-Fields, St. Margaret’s and St. John’s Westminster, St. James’s and St. Anne’s, and St. George’s, Hanover Square—is at this moment under the control and direction of the *court leet*.

PARLIAMENTARY CASES.

A short reference to some of the decisions which occur in Parliament during this reign, will be all that is requisite.

1727. In *Richmond*, the *burgage tenure right* was established.*

Richmond

1728. In *Hendon*, that of the *inhabitants* being housekeepers and parishioners.†

Hendon.

1728. In *Peterborough*, in the householders *inhabitants* paying scot and lot.‡

Peter-
borough.

* 21 Journ. p. 78.

† Ib. p. 131.

‡ Ib. p. 162.

WELLS.

In *Wells*, the right was determined to be “in the mayor, 1729.
 “masters, burgesses, and freemen, admitted to their free-
 “dom, in any of the companies within the city, entitled
 “by birth, servitude, or marriage.”*

The history we have before given of Hythe, equally
 applies to Wells; where, notwithstanding the early docu-
 ments show distinctly the necessity of residence, *non-resi-* Non-resi-
dents were gradually introduced, to an extent subversive of dents.
 the rights of the *inhabitants*.

Thus in 1700, it was agreed, that H. Portman, Esq., (who 1700.
 probably lived in Dorsetshire) should have leave to *be ad-*
mitted free of one of the companies of this city, and then to
 be sworn a burgess, *if he desire it* of the mayor. And
 afterwards, in the next year, by the general assent of the 1701.
 house of the *burgesses*, he was admitted a burgess for this
 city, being first elected into the company of mercers.

The fine paid by *strangers* on their admission to burgess-
 ship, subsequent to the ordinance of the fifth of Elizabeth,
 and the form of the admission subsequent to the charter of
 that queen, varied at different times, as appears by the fol-
 lowing instances.

At a general convocation, held in the fourth year of Queen 1705.
 Anne, John Prowse, Esq., and William Berkley, Esq., were 4 Anne,
 admitted burgesses; and at the same time, gave each one Dec. 10.
 dozen pair of gloves, according to the custom, to be dis-
 tributed among the *burgesses* then present; but it not being
 a pair for each, they voluntarily made up the deficiency, and
 they both being *strangers* paid 20s. each.

Two years afterwards, Mr. W. Pevis, Mr. W. Salmon, 1707.
 and Mr. Richard Cupper, were *admitted* burgesses of this
 city, at the same time they gave one dozen and a half of
 gloves, and paid 20s. as being *strangers*, and 6s. 8d. each,
 being the fees of the house.

In the 10th of Queen Anne, Mr. Charles Taylor, had the 1711.
 consent of the house to be admitted a “*burgess*” of this city,

* 21 Journ. 329.

George II. and he was admitted accordingly, having first taken the usual oaths."

1712. In the 11th year of the same reign, the following order was made, reciting, that for preventing partiality and disputes in electing inferior *burgesses*, on the death or removal of any of the 16 *burgesses*, being of the *common council* of the city or borough, others are to be chosen in the place of the chief burgess, happening to die or be removed, to fill up the number of 24 chief burgesses.

That it was anciently ordained, such inferior burgesses *should not be ELECTED or made at the pleasure of the mayor* for the time being, or any other particular person, but should be *elected, nominated, and chosen*, with the consent of the *mayor, masters, and chief burgesses of the common council* for the time being, or the major part of them, at the convocation or common assembly; which custom and usage has, for a great number of years, been observed without interruption.

And that the books or records wherein the ordinance was entered or enrolled, by reason of the *alterations made in the corporation in the times of King Charles II. and King James II.*, or other accidents, have been lost, mislaid, or destroyed:—for ratification of the custom or usage it is ordered, that the mayor, and two or more of the present masters, together with the chief burgesses of the common council or the major part of them, who thereunto subscribed their names in pursuance of the power given by the charter of Elizabeth, made an ordinance that every inferior burgess should be nominated and elected by the *mayor, masters, and chief burgesses of the common council* for the time being, or the major part of them, at their convocation or common assemblies, in the same manner as they then were and had been for these 20 years last, and by no other person or persons whatsoever, under forfeiture, &c. of 100*l.*

This order was twice declared by committees of the House of Commons to be arbitrary and illegal.

1716. In the third of George I., 33 persons were admitted burgesses, seven of whom, apparently gentlemen of the neighbourhood, are described as being *foreigners*, and not having

Foreigners.

any claim by birth, servitude, or marriage; and nine are described as "*resiants*," but having no claim by birth, servitude, or marriage. George II.
1716.

The burgesses were admitted by their *prolocutors* upon petition, paying their fines and fees, of which the following is a specimen, although the admission was disputed at the time. Prolocutors.

In the fifth of George I., at a general convocation, William Bridges, Esq., serjeant-at-law, was presented to the mayor by two of the mercers' company, and prayed he might be sworn a burgess of the city; to which the other burgesses *objected*, for that none ought to be sworn a burgess before he has, at a regular *meeting* of the *mayor and corporation*, obtained their consent and approbation, which the serjeant had not, as was alleged; and prayed that the by-law, made in the time of Robert Taylor, mayor, might be read—and which was read accordingly; and great contention and strife arising, it was at length proposed and agreed, for preventing the ill consequences of the present disorder, that Serjeant Bridges should be sworn burgess (*salvo jure*); and so as the same should not be drawn into a precedent for the future, nor infringe the laws, customs, and ordinances of the city—and thereupon he was sworn on those terms, and gave gloves, and paid his fees, and left 5s. in the hands of the receiver, to be expended in wine for the entertainment of the burgesses. 1719.

In the second of George I., there was a petition by the citizens or burgesses, and freemen *inhabitants* of the city; and on the report in the next year, the right was *agreed* to be in the "mayor, masters, and burgesses:" but the question was, whether they should be *sworn* burgesses. 1715.

The petitioner tendered the votes of 56 members of the companies who had before demanded of the mayor to be *sworn* burgesses, claiming their right by servitude, or by having been admitted into the companies: and he objected to 60 of the sitting members' votes, for *non-residency*. They were *honorary burgesses*. The sitting member insisted, the right was in the *community* or *select body*, and not in the freemen: and that it was necessary to take the burgess's *oath*, Petition.

Sitting member.

George II. according to the usage as well before as since the charter;
 1715. and that the admission into the companies was for the pur-
 Right. pose of trading. The right was resolved by the committee
 to be "in the mayor, masters, and burgesses;" the same as
 the resolution in 1695, except the omission of the word
 "only;" and the petitioners were seated. So that the votes
 of the *freemen*, who had claimed to be sworn, appear to have
 been admitted; and, in all probability, the *non-residents*,
 or *honorary burgesses*, were excluded: and the *bye-law* of
 1712 was declared to be arbitrary and illegal.

1717.
 Right
 agreed. In 1717, the right was again *agreed* to be "in the mayor,
 masters, and burgesses." But the sitting member again in-
 sisted, that they must be *sworn*; and the petitioner again
 objected to the *non-residents*: and he was seated.

1723.
 Right
 agreed. In 1723, the right was *agreed* to be "in the mayor, mas-
 ters, burgesses, and *freemen*;" which appears to be the first
 instance in which the latter body are expressly recognized as
 voting in that capacity. The qualification of the *freemen* was
 then discussed, and the present anomalous right of voting
 appears to have arisen out of that discussion. Freemen and
 burgesses are strangely confounded together in some places,
 and in others, whimsically distinguished. In this place, a
 freeman's apprentice, and the eldest son of a burgess, and the
 husband of the daughter or widow of a burgess, are quali-
 fied to be freemen; a singular arrangement, that the princi-
 pals should be burgesses, and the derivatives freemen; and
 the sitting member contended, that the *consent* of the mayor
 and common council was necessary previous to the admis-
 sion to the freedom. In the early entries of the corporation
 there is no distinction as to eldest sons;* but all sons were
 treated alike. Nor was the admission by the consent of
 the common council, but of all the *burgesses*; and all were
 admitted as "*burgesses*"—not as *freemen*. The real explana-
 tion being, as stated before, that those only of *free condition*
 could be burgesses; and being a member of a trading com-
 pany, was evidence of being free; because villains could not
 trade—all their property belonging to their lords. This affords

* See before, p. 767.

the real clue to all the apparently contradictory evidence ^{George II.} stated on the Journals. The committee finally decided the ^{1723.} right to be "in the *mayor, masters, and burgesses*," as before; ^{Right.} but added, "and in such persons as are, by the *consent* of "the mayor and common council, admitted to their freedom "in any of the *seven companies*, being thereunto entitled by "birth, servitude, or marriage;" which latter part of the resolution, though it was binding and conclusive as a last determination under the statute of the second of George II., is contrary as well to the tenor and spirit of the ancient common law, as to the charters and early usages of Wells.*

The petitioners then objected to many of the votes for the sitting member, and, amongst others, to a *non-resident*. The sitting members were confirmed in their seats.

After this followed the decision of the second of George II., which is, in effect, the same as that of 1723.

It was reported from the committee, that the petitioner's ^{1729.} counsel alleged, that the city of Wells was incorporated by ^{Report.} the name of mayor, masters, and burgesses, and that the right of being admitted freemen in the companies was by birth, servitude, or marriage, and insisted, that all persons having any such qualification, had a right to vote at the election. ^{Petitioner.}

The sitting member's counsel insisted that the *consent of* ^{Sitting member.} *the mayor* and common council was necessary before they were *admitted freemen*; and said it was settled by the resolution in 1723.

To which the petitioner's counsel replied, that there were ^{Petitioner.} several precedents of the right being settled otherwise.

To which point the following evidence was given:

The *Journal* of the 18th of February, 8th of William III.

The *Journal* of the 26th of May, 1716.

The Resolution of the 30th of May, 1716, as to the bye-law in 1712.

The *Journal* of the 11th of April, 1717, whereby it appeared, that the right of election was *agreed* to be in the mayor, masters, and burgesses.

* Cap. 24., see before, pp. 766, 768, 1006.

George II. *John Lovell* said, he had known the city 40 years—that
 1729. the right of election was in the *sworn* burgesses, freemen, and companies, and that *freemen were admitted by servitude, marriage, or birth*—said, he had heard that Mr. Hall carried his election by freemen, which was then 50 years ago—that the *son of a freeman* had a right to be made free.

That nobody had a right to be *sworn* a Burgess but who *were free of one of the companies*: and that such freemen had a right to vote in elections, whether they were sworn burgesses or not.

That, about 20 years ago, he *was admitted a freeman*—that he never heard of the mayor and corporation's admission before they could be *made free*, till of late years—that he voted at the election of Mr. Coward and Mr. Peirs, as a *freeman*, and there was no objection to him.

That the bye-law was made to affect the companies:—but no bye-law of any one company could affect the others; and that several had been admitted of the company by *being sons of freemen*, but did not name any one in particular.

Sitting
member.

The sitting member's counsel proceeded to prove that none could be admitted freemen of any of the seven companies, without the consent of the mayor and common council; and objected to the right proposed by the petitioner's counsel, insisting upon the last resolution of the 2nd of May, 1723. And the following evidence was also produced, viz.—A charter of the 31st Elizabeth, for granting power to the mayor and common council, to make bye-laws, for regulating the traders and artificers of this city.

1626.
1694.

The ordinances and laws for the company of tailors, &c., and confirming ordinances made in the 34th of Elizabeth, for the better government of the stocking makers, and against admitting any persons into the companies without examination, and proof, before the governing part of such company, of serving seven years' apprenticeship; and without presenting such person to the common council, and having their consent previous to such admission.

The rest of the ordinances relative to the other companies were admitted.

An order in the convocation book, directs that the company of grocers, and all other companies, having no masters, should assemble and choose a master, and bring him before the mayor and recorder, to be sworn by a limited time, on pain of 40s., otherwise the recorder and mayor should choose their masters, and swear them.

George II.

1729.

15 Jas. I.
28th Aug.

Orders were made that no master or wardens of any company should receive or admit any to be made free, without allowance of the mayor, and consent of the common council. And that the *eldest daughter* of every burgess, on marriage with a *stranger*, should thereby make him a freeman, and that he should be of such of the companies as the mayor and council should think fit.

1668.

20 Car. II.
March 8.

1670.

22 Car. II.
Sept. 14.

As many as 200 *instances* were admitted by the petitioner's counsel to be in the corporation books, of applications made to the common council, for leave to be admitted into some of the companies, from the year 1670, to the time of the last resolution of this House, 2nd May, 1723.

Gutch said, it had been usual for all the seven companies, to apply to the corporation before they *made freemen*; that the *qualification* was by *birth, servitude, or marriage*;—that the *burgesses were exempted* from several troublesome offices, which the *freemen were not*:—that the latter could not be of the common council, without being sworn burgesses:—that he did not know of *any freemen being refused to be made burgesses, who asked for it*:—and that freemen had been admitted to vote, particularly in the years 1714 and 1719.

The committee resolved, that the right was as stated above. Right.

To which the House agreed.

Upon another petition, in the seventh of George II., the order of the House for restraining the counsel, at the bar, or before the committee of elections, from offering evidence, touching the legality of votes for members to serve in Parliament, for any county, shire, city, borough, cinque port, or place, *contrary to the last determination of the House of Commons*, was also read; as well as the determination of

1734.

George II. the House, of 1729, concerning the right of election for
1734. Wells.

Petitioners The counsel for the petitioners having produced a copy of the poll taken at the election, and having in order to disqualify several persons who voted for the sitting members, delivered in several lists of such persons, examined several witnesses, to prove that the mayor was guilty of partiality, in favour of the sitting members;—and that he examined many of the *electors*, upon oath concerning their right of voting, and others in contradiction to them: and refused to admit the votes of several electors, who would not take the oath required.

The counsel for the petitioners also offered to produce evidence to disqualify the persons named in one of the lists, upon account of their not being legal burgesses of the city.

Sitting member. To which evidence the sitting member's counsel, having objected, and read the resolutions of the House, of the eighth of William III., concerning the right of election; the counsel for the petitioners then proceeded to examine
Usage. several witnesses concerning the usage of the city in respect to the *admission of burgesses and freemen*, and their respective rights; and read the resolution of 1716 concerning the by-law made in 1712.

Upon a motion being made, and the question put, that the counsel for the sitting members be directed to proceed in their objections to the petitioners producing the evidence offered by them to disqualify several persons who voted for the sitting members, upon account of their not being legal burgesses of Wells, it was resolved in the affirmative.

The sitting members proceeded in their objection: and read the resolution of the House of 1716 and 1723, concerning the right of election, and the report of 1729: as well as the report of the 11th April, 1717, touching the evidence of Richard Thomas. And a motion being made, and the question put, that the counsel for the petitioners be restrained from giving evidence, that it is a necessary qualification of a burgess of the city of Wells that such person, previous to his being made a burgess, should be a freeman of the city,

admitted to his freedom in one of the seven companies entitled to such freedom by birth, servitude, or marriage, it was resolved in the affirmative. George II.
1734.

The House afterwards proceeded on the further hearing of the petition, and finally resolved, that the petitioners were duly elected.

This concludes all that is necessary to be mentioned of the parliamentary proceedings respecting Wells. Other proceedings in the courts of law have occurred respecting the election of the different officers of the corporation, but they contain nothing material to our present inquiry.

The reader will perceive how intricate and complicated the question as to the *burgesses* of Wells was rendered by a departure from the simple course, which appears from the entries, to have been practised in early times; and particularly by connecting with the municipal body of the burgesses, questions relative to the trading companies. The result of this confusion and intricacy, was the unrestrained admission of *non-resident burgesses*, which overwhelmed the voices of the *inhabitants*, and rendered the proceedings of the borough so complicated, as not to be intelligible even to those resident in the place.

But to pursue the few other extracts from the Journals.

In *Newtown*, in the Isle of Wight, the *burgage tenure* right was established.* 1729.

In *Beaumaris*—the *select body* consisting of the mayor, bailiff, and capital burgesses only.† 1729.

In *Stamford*—the *inhabitants* paying *scot and lot*.‡ 1735.

In *Scarborough*—the town council, consisting of two bailiffs, two coroners, four chamberlains, and 36 burgesses.§ 1736.

In *Weobley*—the *inhabitants* of the ancient vote houses of 20s. per annum,|| residing in the houses 40 days before the election; and also in the owners of such ancient vote houses, paying *scot and lot*, who should be *resident* in such houses at the time of the election—a strange determination,

* 21 Journ. 237.

† 21 Journ. 473.

‡ 21 Journ. 616.

§ 12 Journ. 694.

|| 21 Journ. 770.

George II. founded in substance upon the common law, but so mystified as to be hardly capable of solution. The residence of 40 days is in conformity with the ancient law, as is also the payment of scot and lot; but the limitation to ancient houses is not supported by the law, as shown before; and the requisite of 20s. per annum is a fanciful distinction of this place, not warranted by the practice of any other. The owners being entitled to vote, provided they were resident in the houses, is only a bad description of the ancient common law right of *inhabitant householders*; but so worded as to produce doubt and uncertainty.

1741. The right in *Flint* was strangely stated to be "in the *inhabitants* renting lands or tenements,* for which the "landlords only paid scot and lot"—a right totally irreconcilable with any principle of law.

1746. In *Hedon*, the freemen by descent, or by apprenticeship to resident freemen, or by an honorary gift, were said to have the right.

1747. In *Wareham*, it was declared to be† "in the mayor and "magistrates; and in such of the inhabitants as paid *scot* "and *lot*; and in the freeholders who had bona fide to their "own use, or in their actual occupation, or were in the receipt "of the rents and profits, of such lands or tenements, for the "space of one year next before the election, except the same "came to them by descent, devise, marriage, marriage settlement, or promotion to some benefice in the church:"—a singular mixture of the common and statute law; and the borough and county right of election.

In *Worcester*, the right was declared to be‡ "in the citizens admitted to their freedom by birth, servitude, or "redemption."

1755. As to *Haslemere*, the committee resolved, that "in the "last determination in 1661,§ that the inhabitant freeholders "had only voice—by the word '*freeholders*,' was meant "only freeholders of messuages, lands, or tenements, lying "within the borough or manor, whether they paid rent to

* 24 Journ. 137.

‡ 25 Journ. 510.

† 25 Journ. 481.

§ 27 Journ. 293.

“ the lord of the borough or manor, or not, exclusive of any George II.
 “ lands or tenements, which have been parcel of the waste
 “ ground of the borough or manor; and any messuages or
 “ buildings which should be standing or being thereon.”

This appears to be the climax of complication in the definition of a burgess. Nor can the dispassionate reader fail to remark the variety of conclusions at which committees of the House of Commons have arrived upon the simple question of who are the *burgesses* of the different boroughs, when all the early laws, charters, documents and records speak with one voice, that they were all originally the same.

CHARTERS.

The following were the only charters granted by George II. :—

- | | |
|-----------------------------|--------------|
| 1.—1732, 6 George II. | Lostwithiel. |
| 2.—1737, 11 George II. | Lynn. |
| 3.—1738, 12 George II. | Radnor. |
| 4.—1741, 15 George II. | London. |
| 5.—1747, 21 George II. | Weymouth. |
| 6.—1747, 21 George II. | Maidstone. |
| 7.—1751, 25 George II. | Liverpool. |

LOSTWITHIEL.

That to *Lostwithiel* commences by reciting, that James I., 1732.
 in the sixth year of his reign, granted* that the borough
 should be a free borough, and the mayor, burgesses, and *in-* *Inhabitants*
habitants, a body politic and corporate, by the name of
 “ the mayor and burgesses of the borough of Lostwithiel,”
 &c. &c.

• That the mayor and many other burgesses and *inhabitants*
 had petitioned, that they should be re-incorporated, with all
 their ancient privileges, and such in addition as might be
 deemed expedient.

The king therefore granted, that it should for ever be a
 free borough, and that the mayor, burgesses, and *inhabitants*
 should be incorporated by the name of “ the mayor and bur- *Incorporated.*

* Pat. 6 George II., p. 2, n. 14.

George II. gesses," with the usual corporate powers; and the government of the town was intrusted to the mayor, recorder, six capital burgesses, 17 assistants, &c. The mayor, late mayor, and recorder were to be justices of the peace. A court of record—a *court leet*—return of writs—with all other privileges usual in modern charters were also granted.

LYNN.

1737. That to *Lynn* gave to the mayor and aldermen,* power to administer the *oath* of office to such coroners of the borough as then were, or thereafter should be duly elected into that office.

We have before observed, that no persons had power to direct the administration of an oath but the king; and he only for public purposes.

In the instance above, it appears that a charter was granted for the express purpose of authorizing the act, which no bye-law nor other private authority could do.†

RADNOR.

1738. That to *New Radnor* commences by reciting, that it was an ancient borough, and *anciently incorporated*.‡ That the present *inhabitants* thereof, and *those who in ancient times had inhabited the same borough, predecessors of the present inhabitants*, had enjoyed divers liberties, &c., from divers lord marchers and kings of England.

That Queen Elizabeth, in the fourth year of her reign, had declared it should be for ever a borough, by the name of "the borough of New Radnor;" and also incorporated the *burgesses* and *inhabitants*, by the name of "the bailiffs, aldermen, and burgesses." That there should be for ever one bailiff, two aldermen, and 25 capital burgesses and councillors, of which the bailiff and two aldermen, were always to be three; who were to be always called the "common council" of the borough—which the king re-grants in a subsequent part of the charter.

* Pat. 11 George II., p. 2. † Rex v. Dean and Chapter of Dublin, 1 Str. 536.

‡ Rot. Pat. 2, n. 13.

That the common council were reduced to so low a number, George II.
 that for want of sufficient members, no bailiff, aldermen, or Numbers
 capital burgesses, could be chosen and sworn, pursuant to reduced.
 the directions of such charter.

That at the petition of the seven remaining capital burgesses, and of divers others *inhabitants* of New Radnor, the Inhabitants
 king granted that the borough and town of New Radnor,
 and the manor of Radnor foren, &c. should be for ever a
 borough, and called the "borough of New Radnor;" that
 the *burgesses of the borough*, and the *inhabitants* of the
 manor of Radnor foren, &c. now being, were to be burgesses
 of the borough, and one body corporate and politic, by the
 name of "the bailiff, aldermen, and burgesses of the borough
 of New Radnor." The usual corporate powers follow, and
 the nomination of the corporate officers, &c.

The king then grants the borough, manor of Radnor Burgesses.
 foren, and other lands, to the burgesses, "with his annual
 rent of sixpence."

That no bailiff, alderman, common councillor, chamberlain, coroner, and all other inferior officers of the borough, should be or remain in such office longer than he, together with his family, should be *abiding, residing, and inhabiting* Residing.
 within the borough, liberties, or franchises, of New Radnor.

A court of record—view of *frankpledge* of all burgesses, inhabitants, and resiants, within the borough—return of all writs — assise of bread, wine, &c. — all issues, fines, and amercements, &c. are granted.

That all men *abiding and residing* within the borough, manor, and liberties, &c. should be contributors to *scot and lot* with the burgesses, in all aids, tolls, taxes, &c. Scot and lot.

That no *freeman* should implead another *freeman out of the borough* for any debts, or contracts, &c., entered into within the borough.

That the common council should have power to make *free burgesses for the borough out of the inhabitants*, and to Inhabitants
 bind them by oath to obey the common council in all lawful things; with other clauses usual in the English charters.

George II.

LONDON.

1741. That to *London* provided, that the mayor, recorder, and all the aldermen of the city of London for the time being, should be justices of the peace within the city and liberties, &c.*

WEYMOUTH.

1747. That to *Weymouth*† was an explanatory charter, directing that the aldermen and the capital and principal burgesses of the borough and town for the time being should be capable of being elected to the offices of mayor and bailiffs, both at the annual elections, and on every vacancy that should happen; and concluded with a confirmation of all previous liberties and privileges.

MAIDSTONE.

1747. That to *Maidstone*‡ commences with a recital, that the *Inhabitants inhabitants* had enjoyed divers liberties, &c. by the name of the “mayor, jurats and commonalty,” and re-incorporates them by the name of the “mayor, jurats, and commonalty.” The charter afterwards proceeds to grant, amongst other usual privileges, that 13 of the *inhabitants* should be jurats, and one of them mayor. And that 40 of the remaining principal *inhabitants* should be of the common council. A recorder, deputy recorder and serjeants-at-mace, are then appointed. And it provides, that the mayor, jurats, and com-
Admission. monalty might *admit* any person, an *inhabitant*, or *not* an inhabitant, as a freeman of the town.

- This borough has been mentioned before, and its charter,
1559. in the reign of Edward VI., extracted. Queen Elizabeth, in the second year of her reign, granted another charter to *Inhabitants* the *inhabitants*, and incorporated them, by the name of the “mayor, jurats, and commonalty,” with the usual corporate powers, and provisions for the annual and other elections. The commonalty were exempted from serving on juries, and

* Pat. 15 George II. p. 1.

† Pat. 21 George II. p. 1.

‡ See before, pp. 86, 1162, 1222.

the mayor, jurats, and commonalty were to return two mem- George II.
bers to Parliament.

In the same reign many bye-laws were also made, resembling those we have previously quoted, from other places, particularly the Cinque Ports.

The returns to Parliament were chiefly made by the mayor, 1600.
jurats, and commonalty. In one return, in the 43d of Elizabeth, they are emphatically described in the indenture as being—in the language of the common law—the *free* and *lawful* men of the borough and parish.

James I., in the second year of his reign, granted Maid- 1604.
stone another charter, again incorporating the *inhabitants* by Inhabitants
the same name, with the usual corporate powers and provisions for the elections.

In the 17th of James I., there was also another grant of 1619.
the markets and fairs; and the charter referred to that of Elizabeth, as to the election of jurats, and gives further directions to remove doubts respecting those elections. A clause is also inserted for the *making of freemen*, similar to the one quoted above in this reign.

In the 19th of James I., there was also a declaration by 1621.
the king as to the privileges of Maidstone.

The same course of the surrender of the charters, and the 1682.
grant of a new one by Charles II., with the revival of the 34 Car.II.
former grants by James II., occurred with respect to Maid- Surrender,
stone, as in the other boroughs at that period. &c.

The abuses of *non-residents* had grown to a great extent in Non-
the reign of George II.; and in a letter (among the South- residents.
well MSS.), from the Earl of Winchelsea to Mr. Southwell, in the seventh of George II., he speaks of 400 persons coming from London to vote at the elections.

At the same period, there were also some legal proceedings, which ended in the dissolution of the corporation.

The two following should be inserted :—

Application was made for leave to file an information in 1736.
the nature of quo warranto,* against the defendants, who had been chosen jurats of the corporation of *Maidstone* by a

* King v. Tomlyn and others, Cases temp. Hardwick, 316.

George II. *select number of inhabitants*, the charter directing the choice to be by the *inhabitants*; which refers to a *majority of the whole of that body*. It was objected against granting the information, that there had been a *long usage* to choose them in this manner.—But the court granted the information; Lord Hardwick saying, that “though according to the *case of corporations*,* where a charter directs the election to “be by the *mayor, jurats and commonalty*, the body may “make a bye-law to vest the power of election in any “select number; yet here, the question being, whether there “is such a bye-law or not, the court cannot determine “that upon motion, but it must be tried; and therefore, “in the case of Brecknock, though the special verdict found, “that the defendant’s election was according to a very long “usage, yet not having found expressly that there was a “bye-law for that purpose, judgment was given against the “defendants:—for no *usage, how long soever, in case of a corporation by a charter, can support an election made otherwise than according to the words of the charter*, unless the “jury find there was a bye-law for that purpose: though “possibly it may be otherwise *in case of a corporation by prescription*.”

It has been sufficiently shown, that in fact there were no corporations by prescription, and therefore this point never could arise. If it could, it would appear difficult to establish any effectual distinction upon it.

1738. In a case of quo warranto, respecting Maidstone,† it appeared that “by *letters patent, 2 James I.*,” it was granted that the mayor and jurats should choose jurats out of the *freemen only*.

And that by another charter in the 17th James I., it was recited that by the charter of *Queen Elizabeth* it was granted to the mayor, jurats, and commonalty, (when it should have said, “mayor and jurats only,”) that they might choose jurats out of the *inhabitants*;—and that by the charter of 2nd James I. it was granted, that the mayor, jurats, and *commonalty* might choose jurats out of the *freemen only*; there-

* See before, p. 1448, et seq.

† King v. Blunt, Andrews, 293.

fore to prevent all doubts, &c., it was ordained, "that it ^{George II.} should be lawful for the mayor, jurats, and commonalty, to choose jurats out of *the inhabitants at large*." Inhabitants

The question upon demurrer was, whether, upon the construction of this last charter, it be necessary for the *commonalty* to concur with the mayor and jurats, in the election of a jurat in the case of death; the defendant's election appearing to be by the mayor and jurats only.

The whole court were of opinion, that upon the construction of the last charter, the *right of election was in the mayor, jurats, and commonalty*—for the words, "it shall and may be lawful," are express words of grant.

In consequence of this decision, the election by the jurats 1619.
and common council, which had prevailed from the grant of 1715.
the charter, in the 17th of James I. till 1714—nearly an
hundred years—was set aside, and seven of the jurats were 1738.
displaced—judgments being given against two, and five dis-
claiming—leaving only three. Three assembled with three
common councilmen, and 54 freeholders, and elected 15 per-
sons as common councilmen; three of whom were elected
and sworn as jurats.

But subsequently the title of the three remaining jurats was attacked: a quo warranto information being filed against one of them; which was tried at bar, and a verdict being obtained against the defendant, and judgment of ouster entered against him, the two others disclaimed: which was followed by a quo warranto against one of the six new jurats, which being also successful, the other five disclaimed, and the town was left without a jurat. In consequence of which, the corporation was reduced to such a state, that it was unable to act, and it became necessary to apply to the crown for a new charter. Accordingly, two petitions were presented to the king, in which the *inhabitants* joined; and being referred in the ordinary course to the attorney and solicitor-general, they recommended that a new charter should be granted to the *inhabitants*, agreeably with the charter of the 17th of James I., excepting in the alterations which they proposed: upon which basis the charter quoted

George II. above was founded: being still an incorporation of the inhabitants, and granting them, under their corporate name, all the usual privileges.

LIVERPOOL.

1751. The charter to *Liverpool** was merely explanatory—granting that every mayor of Liverpool should continue to be, and act as one of the *justices* to keep the peace in the town, liberties and precincts thereof. That the four aldermen for the time being, next the senior alderman, whilst they remain members of the common council of the town, should be additional *justices* to keep the peace within the town and liberties thereof. That the recorders might appoint deputies during their absence or indisposition; and that the mayor bailiffs, and burgesses might enjoy all their former liberties and privileges.

Common halls or assemblies of the *inhabitants* seem, about this time, to have been held for transacting the business of the town.

1759. But in this year, during the mayoralty of Edward Halsall, a *bye-law* states, that “there had formerly been a custom, Common council. “that the town should be ordered by a *common council*, “without the rest of the commonalty, as in other corporations;† but that such custom had been so defaced by the “usurpations of the commons, *that, in effect, there remaineth* Jury. “*no memory thereof at all*: saving that 24 *burgesses*, once “every year, being impannelled, &c., have, for some remembrance of the former customs, taken upon them to pre- “scribe rules and orders for the government of the town.”

It is then ordered, that “the late usurped assemblies shall “be abolished, and the ancient custom of common council “restored,” &c.

- Notwithstanding this order, the *burgesses* still continued to assemble together to transact their own concerns. And in confirmation of the point so frequently urged, that the Jury. “common council” were the jury; the bye-law above speaks

* Pat. 25 George II., p. 4.

† Probably founded on Dr. Brady.

of them, in the language applicable to such a body, as being George II.
 “annually *impannelled*.”

But their right to elect and admit the *burgesses* was disputed in the following case in the beginning of this reign.

In Easter Term, the third of George II., a rule was made 1729.
 upon William Pole,* one of the *bailiffs* of *Liverpool*, and
 upon Richard Norris and others, *twenty-two of the* common
 council, to show cause why an information in the nature of a
 quo warranto should not be exhibited against them, to show
 “by what warrant they, without the mayor, and not being
 “twenty-five of the common council of the town, claim to use
 “and enjoy the liberty, privilege, and franchise of *electing*,
 “approving, and admitting persons to be *burgesses* of the Burgesses.
 “town.”

Which rule, after several enlargements, was, in Michael- 1730.
 mas Term, fourth of George II., made absolute.

And in Easter Term, in the same year, rules were given
 to plead to an information, which had then been accordingly
 exhibited against them, and a plea of disclaimer was entered.

CASES.

Some few decisions in the courts of law of this reign, will
 require to be inserted; and that they may explain each other,
 they will be quoted in their chronological order.

Upon a writ of error, in the House of Lords, in the second
 of George II.,† in a case relative to a capital burgess and 1728.
 common councilman of the borough of *Brecknock*, it was Breck-
 decided that the acceptance of a new charter, whereby the nock.
 election of *burgesses* was directed in a manner different from
 that which had obtained from the 15th of Elizabeth till
 the second of George II.‡—upwards of 200 years—such
ancient usage, being inconsistent with the new grant, can no
 longer subsist, but is determined by the acceptance of the
 new charter, which must afterwards be the only rule by
 which the election of burgesses was to be governed.

* *Rex v. Pole*, cited 4 Burr. 2261, in *Rex v. Breton*. † 2 Bro. Par. Ca. 298.

‡ 2 Bro. Par. Ca. 298, in error, *Powell v. The King*.

George II. Some cases also occurred with reference to the usurpations of *non-residents*. Thus in one relative to *Gloucester*.

1728.
Gloucester.

Mr. Wills moved for an information, in the nature of a quo warranto, against several persons, for *acting as freemen of the city of Gloucester,* not residing there at the time of their election*. The point on which this question turned was, whether the corporation, that is the acting part of the body of this city, can *make honorary freemen*.

Not
residing.

Honorary
freemen.

Now, he observed, that *no corporation* can do this, unless they *have a prescription* or a clause in their charter to support them in it. But in the present case, though indeed they have sometimes *complimented noblemen* and others of the first distinction with this privilege, yet that was only a thing connived at, and can be no warrant to them in what they have now done, *making 119 strangers free at one instant*. Besides, too, in this corporation there are very particular privileges given to the *freemen*, and one above all in being toll free throughout the kingdom: now by the same way of reasoning, as they may *make 119 free*, they may *make every person in England so*, and by this means take away from the king this part of the revenue. But if they should claim any colour of a *prescription* to support them in what they have done from these few and uncommon instances, the charter of King *Charles the Second*, which they accepted of, has clearly taken it from them, by *incorporating* them by the names of *cives, residents*, and *inhabitantes* of this city.

But the court said, that they were of opinion that every *corporation* may make what person they will *free of it*, and this is an incident belonging to them, *de jure*, unless there is a *prescription*, or express words in the charter to the contrary, restraining them in some particular cases. The court observed further, that this complaint was only of the imprudent exercise of a privilege, and not of the illegality of it; and, therefore, this application was not proper. They said too, that the charter could not make a difference; for *all incorporations* are in this *manner*. Accordingly they refused even to make a rule to show cause.

* 1 Barnardiston, 137. Anonymous.

Another case also occurs in the fourth of George II., relative to *Exeter*. Upon a rule* to show cause why an information, in the nature of quo warranto, should not go against the defendant for taking upon him the office of *common councilman* of the city of *Exeter*. The case was, that the city of *Exeter* was *incorporated* in the third of *Car. I.*, and the charter provided, that de cætero in perpetuum the common council should be elected de *discretioribus civibus et inhabitantibus* civitatis prædictæ; and further ordered, that in case *any freeman of the city* should refuse to *execute any* of the offices within the city, he should be grievously *punished*. The defendant was elected into the office of common councilman, being a *freeman*, but *not an inhabitant*; and whether this was regular, was the question.

George II.

Exeter.
1730.

Mr. Fazakerly said, that in general it must be allowed to him, that where the *inhabitants of a town* are *incorporated*, and no provision made out of whom the officers of the corporation shall be elected, they may be elected out of the *freemen at large*, as well as the *inhabitants*; and so was it determined in the case of the *town of Hertford*, and likewise in the case of one *Powel*, for the *town of Brecknock*. The difficulty, then, in this case arises from the *words of the charter*, which seem to make *inhabitancy a necessary qualification* to a *common councilman*. But as to that, he thought the words might well be construed by way of *direction*† to the electors, as pointing out what would generally be most proper, rather than by way of *restriction*, as making this absolutely necessary. To which purpose the case was cited of the borough of *Truro*, where there was a clause, that the aldermen should be "*annuatim eligendi*;" the first sense that has been mentioned was put upon these words, and not the other. It was however said, that what would effectually determine this question, was the subsequent clause in the charter, whereby all the *freemen, inhabiting or not inhabiting*,

* 1 Barnardiston, 416.

† The reader will remember that the doctrine of words in a statute being *directory*, was first introduced by Lord Coke, in order to excuse his sitting in the House of Commons for Buckinghamshire, though not resident in the county, contrary to the words of the statute.

George II. are required to be punished in case they do not execute the
 Exeter. offices within the corporation.
 1730.

The court said, that this charter has provided expressly in many other instances, that the elections should be out of the freemen at large, as well as those inhabiting within the city; and, therefore, they thought the construction of this subsequent clause might well be construed reddendo singula singulis, that freemen should be punished for refusing to execute those offices which they were capable of executing;—and that the freemen, inhabitants, should only be punished for refusing to execute those offices, of which they were capable. And as to the words civibus et inhabitantibus, they thought both qualifications must concur in the same person, and that the words must be construed by way of restriction. Accordingly the rule was made absolute.

Radnor. Another case occurred in the fifth year, relative to Radnor.*
 1731.

On a rule to show cause, why an information in the nature of a quo warranto should not go against the defendant for exercising the office of *capital burgess* in the town of New Radnor, not being an *inhabitant* at the time of his election, Mr. Reeves said, that the clause of the charter only declared, that no capital burgess should exercise his office any longer than he was *an inhabitant in the corporation*, which is no express declaration that they should be *inhabitants* at the time they were elected. And besides, the present defendant came *with his family*, and *inhabited* in the town before the motion was made for the information. He submitted that the court would determine this point on the rule for showing cause, and would not put the defendant to the expence of a special verdict. Accordingly he observed, that the court had determined a point of much greater difficulty than this in the case of the town of *Pomfret*, when that matter came before them in the same manner as the present. There the charter required, that *no person should be mayor* unless he *was an inhabitant* at the time of the election. A person came and lodged at an inn for a *month*; and the court

* The King and Pool, 2 Barnardiston, 93.

determined that to be a sufficient *inhabitancy* to qualify him for such election. However, the court made the rule absolute, and thought this a matter proper to be decided in a more solemn way.

George II.
Radnor.
1731.

The law also with respect to foreigners, arose in the following case relative to *Ipswich* :*—In an action upon the case, the plaintiffs declared, that the town of *Ipswich* was a borough by *prescription* : and that during all that time the burgesses of the town were an *incorporation*, and for many years past, had been incorporated by the name of the “bailiffs, burgesses, and commonalty of the town or borough of *Ipswich*.” That within the borough there had been an ancient and laudable custom, that *no foreigner, not free* of the borough, should keep any shop within the borough, town or liberties thereof, without a license from the *corporation*. Nevertheless, that the defendant did keep a shop there, being a *foreigner*, without any license. To this, the defendant pleaded not guilty. The plaintiff’s counsel offered to prove that there had been *anciently courts held* within the borough, before the *bailiffs* ; and this they submitted was *evidence of the borough’s being very anciently a corporation*. But Mr. Baron Comyns was of opinion, that it was no evidence ; because a *borough is of itself capable of holding courts* ; and therefore that evidence was not allowed. The counsel for the plaintiff then said, they would prove, that anciently the borough enjoyed lands, which they submitted, was evidence of the borough’s being at that time a corporation ; which evidence the court allowed. And to answer it, the *counsel for the defendant* said, they would prove, that there was a time when there was *no seal in this borough* ; which would be evidence, that at that time there was *no corporation* in it. They said further, that the *corporation was erected by charter of 6 John* ; and relied upon these words in it, *burgenses habeant guildam mercatoriam*. The judge was of opinion, that these words anciently would

Ipswich.
1731.

*The Bailiffs, Burgesses and Commonalty of the town or borough of Ipswich, v. Johnson, 2 Barnardiston, 120.

George II. create a corporation; and for that purpose said there was
Ipswich. an authority in Rolle's Abridgment.
1731.

The counsel for the plaintiff then went into their evidence to prove the name of the corporation: and produced a recital of a charter made in Edward IVth's time; by which the *burgesses were incorporated* by the name of "the bailiffs, burgesses and commonalty of the town of Ipswich." The *defendant's counsel* objected that this would not prove the name of the *corporation*, as laid in the declaration. They agreed, that such variance would not have been material in any action brought *against the corporation*; but in every action brought *by* them, they must prove the same strictly as they have laid it. For this purpose was cited a case out of Bro. Abr. But the court was of a different opinion, and cited Dr. Ayray's case, 11 Rep.

The last thing endeavoured to be proved by the plaintiff was their custom. In order to do which, much evidence was produced, and a living evidence owned, that he never knew *butchers pay foreign fine money*; neither did he ever know any *foreigner* pay it, living *within the liberty* and *out of the borough*; and that freemen's widows were always thought to be exempted during their widowhood. The judge said, that he thought these would be material exceptions against the custom, as laid in the declaration. But the great difficulty with him was, whether any of the written evidence had proved the plaintiff's custom. The proof, he said, was beyond contradiction, that the *foreigners* had been for a long time past fined for keeping shop without a license; which he agreed was strong evidence that the *corporation* had a right to those fines. An action of debt therefore, he thought might be well maintained for them. But the doubt with him was, whether this evidence would amount to proof, that the *corporation* might *totally exclude foreigners* from erecting shops *arbitrarily at their own discretion*. He said further, that he was far from being clear, that the custom, as laid in the declaration, was good in point of law. But that question was unnecessary to be argued now, because his opinion was, that the evidence did not maintain

it. Accordingly, the plaintiff's counsel agreed to be non-George II.
sued. Ipswich.
1731.

The doctrine asserted by the learned judge, that a "guild" or "mercatoria" made a corporation, seems to have been adopted from Dr. Brady; upon whose work observations have already been made.

The following case also as to *Orford*, will show the opinion which was at this time entertained by the courts as to residence. Orford.
1733.

On five informations in the nature of a quo warranto, against several defendants for exercising the offices of capital burgesses in the borough of *Orford*, there were four issues joined in each of them; *First*, that the defendants were *not inhabitants* at the time they were chosen, which the *charter requires they should be*. *Secondly*, that Robert Duffin who presided at their election, was not mayor. *Thirdly*, that the defendants were not duly elected. And *lastly*, that they did not take the *oaths* proper on such occasion.* Not in-
habitant.
Oaths.

In evidence on the first issue, the counsel for Malet, one of the defendants, proved that he was *born in the town*; that he served an *apprenticeship* with his father; and lived a journeyman with him ever since. On the other side it was submitted, that this *was not sufficient* to make the *defendant an inhabitant*. He ought also to have *been a housekeeper*; 2 Inst. 703. The judge declared his opinion, that to make the *defendants inhabitants* within the intent of the charter, they not only ought to have been *housekeepers*, but even to have paid *scot and lot to the poor*. House-
keepers.

Accordingly a verdict was directed against three of the defendants, for their *not being able to prove such inhabitancy*.

In two other of the informations, the *defendants' counsel* were able to prove such an *inhabitancy*; upon which they went on to prove their *second issue*, that Robert Duffin was mayor at the time he presided; and submitted, that the proving him to be so de facto, would be sufficient; but the judge was of a different opinion, and said, that they *must*

* The King v. Malet and others, 2 Barnardiston, 406.

George II. *prove him* in all respects to be *mayor de jure*; and for this purpose directed them to show that he had taken the oaths to the government duly according to the statute. When the defendants' counsel proceeded in the proof of that fact, it appeared that the sessions held for the borough wherein he took these oaths, were not held at the time limited by the charter; accordingly, a verdict went for the king on these two informations, as well as the others.

The following case relative to the same borough should be added, for the purpose of showing the necessity of *inhabitant. inhabitancy*, and also, that the whole corporation should join in the corporate acts.*

1733. *Mr. Abney* moved, that a rule to show cause might be made absolute, for granting an information in the nature of a *quo warranto*, against the defendant Duffin, for acting as *mayor*, of the borough of *Orford*; and likewise against several other defendants, for acting as *capital burgesses* of the borough; the validity of whose election depended on the election of Duffin.

The constitution of the borough consisted of a *mayor*, *eight portmen*, and 12 *capital burgesses*: who had the power of nominating *two of these portmen*, to the *inhabitants*,† and appointing one of them to be mayor for the year ensuing. The *charter-day* is the Monday before the feast of St. Michael. And when Duffin was chosen to be mayor on the charter-day, *no mayor was present* at the assembly, by reason that Scolden, the former mayor, had at that time judgment in *quo warranto* given against him. Upon this state of the case, *Mr. Abney* submitted, that the election of Duffin was illegal: and the court inclined to be of the same opinion. The chief justice said he did agree, that wherever any business was to be done by a particular part of a corporation only, the presence of the mayor was not requisite at the assembly; but wherever the business was to be done by the *whole corporation at large*, the presence of the mayor was absolutely necessary. In the present

* The King v. Duffin and others, 2 Barnardiston, 370.

† So East Looe, Truro, St. Alban's, 1553, 7 Edward; see before, p. 189.

case, he thought *all the members of the corporation had a voice in the election*; and accordingly the rule was made absolute. George II.
Orford.
1733.

There is a third case, which also establishes the necessity of *residence*, by the charter: the words of which are set out in the case. But the courts appear at that time to have yielded to the usage in favour of non-residence, and disregarded what seems to be the clear import of the charter. 1734.

On a rule to show cause, why *quo warranto** informations should not be granted against the defendants, for exercising the office of capital burgess and other offices, in the corporation of *Orford*, *Mr. Draper* said, that with regard to some of the defendants, he should not oppose the rules being made absolute, but as to *Scolden* and *Brady* he submitted the rules ought to be discharged.

With regard to *Mr. Scolden*, he said, the charge upon him was for acting as mayor; and he could not deny but there were two entries made in the corporation books, that he had acted in that capacity. But those entries were made by mere mistake. With regard to *Mr. Brady*, the charge was, that he had *acted as capital burgess*, after he *left off residing within the borough*, and the words of the charter are, That *no person should continue a capital burgess longer than he was an inhabitant within it*. He said he should not contend, but that *Mr. Brady* chiefly *resided in a village near adjoining*. But he had many affidavits to show, that *Mr. Brady* occupied a house within the borough, which was let out partly in lodgings, and the other part was in his own hands: that he was rated for this house; and a churchwarden this very year. *Mr. Sherston*, on the same side said, that a person might *be an inhabitant in two places at one time*; for which purpose he recited 5 Rep. 67; and 2 Inst. 173. *Mr. Abney* argued on the other side, and said that he should not contend, but that the occupying land or a house in a parish, would to some purposes *make a man an inhabitant*; but conceived that *resi-* Inhabitant.
Residence.

* The King v. Scolden and others, 2 Barnardiston, 439.

George II. *dency* was essentially necessary in the present case; and for
 Orford. this purpose mentioned the case of the borough of *Rad-*
 1734. *nor*, where the paying taxes for land was held not to be sufficient. The court said, that it was only sworn in the affidavits, on which the rule was obtained, that Mr. Brady resided in this other village; without any *words as to his residing within the borough*. And they thought it sufficiently appeared by the affidavits, on the part of the defendants, that Mr. Brady was considered *an inhabitant* in this borough, within the intent of the charter. The chief justice said, in the case of Sir William Lowther, the court refused granting an information against him for exercising an office in the borough of *Pomfret*, though it appeared that he took a house in the borough, *to qualify himself only the day before the election*. He said likewise, that there was no pretence to make the rule absolute as to Mr. Scolden. Accordingly the *rules* relating to him and Mr. Brady *were discharged*.

SHREWSBURY.

There is also a case as to *Shrewsbury* respecting the necessity of residence for an alderman; upon which ground he was removed from his office.

1737. Upon a mandamus to the defendants to restore C. Kinaston to the office of alderman, of the town of *Shrewsbury*, they made the following return :*—They set forth their charter, which requires *that all the aldermen should be resident within the town*, and so continue always, unless some contagious distemper was in the town: and that the next serving alderman should always be from time to time, elected mayor; that Kinaston was duly elected and sworn an alderman, but had *absented* himself from the town for the
 Residence. space of three years, and resided in places *remote and unknown*, and that there was no contagious distemper there; that one Floyd was mayor of the town, and in his mayoralty, a court was duly assembled, and it appearing to that
 Abiding. court, that Kinaston *was not abiding in the town*, there-

* Cases temp. Lord Hardwick, 147, 295, 377.

fore the mayor, &c. be adjudged that he should be removed George II.
1737.
from his office of alderman, &c.*

The cases before quoted, for the purpose of showing the necessity of *residence* for all persons filling offices within the boroughs, may properly be followed by one, which will establish that *all* the *inhabitants* (assuming always that they were of sufficient ability, and proper and fit persons to be chosen,) were liable to be elected for the several public offices and functions within the boroughs:—being in fact, that liability, which was by the laws of William the Conqueror, and has been ever since described as bearing “*Lot*.” And therefore, when a body, having the right to make bye-laws to govern the inhabitants, and to make secondary burgesses out of the inhabitants, and capital burgesses out of the secondary burgesses, made a bye-law, that every inhabitant chosen a burgess, and refusing to serve, should forfeit a penalty; it was held a good bye-law; but that it related only to *inhabitants* refusing to be secondary burgesses, and not to the secondary refusing to be capital burgesses.†

Woking-
ham.

ROCHESTER.

Besides the bye-laws which we have before extracted 1737.
from the records of Rochester,‡ others were at this period enacted, which commenced by reciting, those previously passed respecting the *necessity of residence*, for the municipal officers: and then proceeded to enact—

That if any person should be elected an alderman or assistant of the city, and should absent himself for more than eight weeks together; or should absent himself from his *habitation* for the major part of any *six months*, to be taken together, without having assigned a reasonable cause, or obtained the written permission of the major part of the aldermen and assistants, should be deemed and taken not

* By Lords reversed; 2 Stra. 1061; Andr. 85, 104.

† Mayor of Wokingham v. Johnson, 2 Com. Dig. B. 2, 15.

‡ Vide ante, p. 1711, et seq.

George II. to be "most commonly and ordinarily *resident*;" but to
 1737. have wilfully departed and absented himself from his duties, and for that cause should be removable by the mayor, aldermen, and assistants, who should have power to appoint a successor.

HASTINGS.

1736. We have seen the *burgesses* of *Hastings* mentioned in Domesday:* and the services the barons performed in the reign of Henry II., and King John. Its *custumal*, has also been referred to, and it has been shown that the men of the town, in the reign of Edward II., paid *scot and lot*—that it returned members to Parliament from the reign of Edward III.—notwithstanding which, it appeared the House of Commons, in the reign of William III., decided the right of election to be "in the *freemen*," and not, according to the ancient documents, either in the *burgesses* or *barons*. This necessarily involved the borough in all the questions connected with corporation
 Scot and lot.
 1736. law; and in the 10th of George II., a *mandamus* was applied
 Freemen. for by Mr Henry More, to admit him as a *freeman*, upon an allegation of a custom, that the *eldest sons* of freemen born in the town, after the admission and swearing of their fathers as freemen, had a right to be admitted on the payment of a reasonable fine.† The custom was denied, and an issue was
 Custumal. joined to try the fact. Upon the trial the *custumal* was produced—which has since been lost—undoubtedly a just ground of complaint. But it is immaterial to our present inquiry, as the principal part of it is still preserved in the State Trials, and it in substance corresponds with the other *custumals* of the Cinque Ports, already quoted. Probably it ought, with more propriety, to be considered as the *custumal* of the whole body; rather than of Hastings, individually.

Many entries were also read in evidence of the admission of freemen from the year 1577; but which are in substance the same as those we have already extracted, respecting Hythe, and the other Cinque Ports. They were at first

* Vide ante, pp. 97, 415, 533, 596.

† 17 State Trials, 846. Ca. temp. Hard. 2 Strange, 1070.

at the *court leet*; as they are stated to be “ at the court of ^{George II.} “ our sovereign lord the king.” But, subsequently, as in 1736. other places, they were, without sufficient authority, transferred to the corporate meetings; though sometimes they were, as in Hythe, at the “ full court.” And, notwithstanding, some of the forms of the old law were still continued; as giving their *pledges**—describing those who were admitted as *inhabitants*—and binding those who were not so, to become *housekeepers*—and to pay scot and lot, and do watch and ward, and all duties incumbent upon freemen—and if any one of them should depart, or dwell out of the town for *a year and a day*, they were to lose their freedom:—yet, by degrees, the mayor and jurats claimed for themselves the right of electing and admitting *such freemen as they thought fit*, and admitted many *honorary freemen*, as members of Parliament, captains of ships, &c.

It also appeared in evidence, that there was *a roll* of the freemen, as anciently required by the common law—and Lord Hardwick, in summing up the case to the jury, properly observed, that “ it was *an extraordinary custom for a man to have a right to be admitted a freeman who was not resident; and yet the corporation could disfranchise a man for non-residence.*” He particularly referred to that part of the custumal of the Cinque Ports, which we have before cited; by which, if a foreigner resided for a year and a day in the Cinque Ports, he might come before the bailiffs and jurats, and be admitted to the freedom upon taking an oath—which, with the exception of its not being done at the *court leet*, is in perfect accordance with the common law. Nor is it contrary to the common law, that in the intervals between the courts, the bailiff, or presiding officer of the king, should admit and swear such persons as had resided there for a year and a day.

Roll.

Lord Hardwick *added*, “ that as to the right which has “ been set up for the defendants, that *all is at the will and “ pleasure of the mayor and jurats, and that there is no right “ at all to be free; it was such an extraordinary custom as he*

* See before, Huntingdon, Wells, Lynn, Yarmouth.

George II. "hardly ever heard of, and knew no such instance any where.

1736. "Some right there must be," &c.

He also commented upon the inconsistency of admitting *non-resident* honorary freemen; when the custumal expressly required that they should be *commorant and resident*.

The jury found, that the *eldest* son of a freeman had a right to be made free. Thus, apparently, limiting the common law right by birth, to the more restricted right of primogeniture: the inapplicability of which had been before shown.* And in defiance of the custumal, they found that residence was not necessary.

NEWCASTLE.

1748. An officer of *Newcastle* was removed from his office:† because he had been absent from the corporation *twenty-two years*, and resided at a distance of *two hundred miles from the borough*; which being considered as a *total desertion* of the duty of his office, it was holden to be a good cause of *removal*.

DONCASTER.

Non-resi-
dence.

The following case also relates to the subject of *non-residence*; but it will be seen that the court began first to doubt about the power of removal; and next as to the ground for it—apparently sanctioning a residence a *short distance out of the borough*. Which, if once admitted, introduces general *non-residence*: because, beyond the limits of the borough all the jurisdiction ends; and if the boundary is once passed, there is no other limit.

A residence, therefore, two or three miles out of the borough, should be considered the same as if it were ever so remote; because the principle is equally destroyed, and the whole is then left in doubt and uncertainty. However, the following is the case, which relates to the borough of *Doncaster*.‡

* See before, pp. 22, 349, 687, &c.

† *Rex v. Mayor of Newcastle*, M. T. 21, Geo. II. Say. 39, cited ib.

‡ *Rex v. Mayor and Aldermen of Doncaster*, Say. 37.

To a mandamus for restoring John Beale to the office of ^{George II.} ~~alderman~~, the return was, that he was *not resident* in ^{1752.} ~~the~~ borough at the time of his election, but lived at the distance of three miles from thence, and had not since *resided* in the borough. That, upon his being present in a common council, he was charged with, and accused of, *non-residence* and *non-attendance*; and that not offering any defence, the common council had removed him.

Lee, C. J. It does *not* appear from this return, *that a power of removing from an office*, for good cause, is *vested in the common council*. Such a power is, indeed, incidental to every corporation: but it *never* can be exercised by a *part of a corporation*, unless it is vested in that part by charter or prescription.

If it had appeared from this return, that a power of removing from an office, for good cause, was vested in the common council, the *cause* returned for the removal of Beale was *not a good one: as he resided so near the borough, that he might attend the duty* of his office. And it does not appear that more than *one common council*, at which he did not attend, was holden whilst he was in the office of alderman. There was not therefore such a total desertion of the duty of his office, as was a good cause of removal; and it would be *very strange* to hold, that the *residing two or three miles out of the borough, which officers of a corporation frequently do, is a good cause of removal from an office*.

In the case of *Newcastle*, the officer removed had been absent from the corporation *twenty-two years*, and resided at the distance of *two hundred miles* from the borough; which, being considered as a *total desertion* of the duty of his office, it was holden to be a good cause of removal.

This return is bad for another reason; namely, that it only charges a general neglect and omission by Beale, of the duty of his office; whereas it ought to have shown *the particular instances* of neglect and omission, that the court might have adjudged, whether such neglects and omissions are a good cause of removal.

In the case of *Doncaster, Lord Raymond*, 1566, the return

George II. to a mandamus for restoring Scot to an office, was, that Scot
 1752. had obstinately, and voluntarily, refused to obey several orders and laws made for the good of the borough, contrary to the duty of his office. This return was holden to be insufficient, because it did not show the *particular orders or laws* which Scot had refused to obey.

It has been said, that Beale was incapable of being elected an alderman, on account of his *non-residence* in the borough at the time of his election ; and that therefore he ought not to be restored. But as he was, in fact, elected, it is *not a good return to a mandamus* for restoring him, *to say that he was incapable of being elected*. The proper way of trying, whether he was incapable of being elected, being in an information in the nature of a quo warranto.

CARMARTHEN.

1755. Upon a rule to show cause,* why a mandamus should not be awarded for proceeding to the election of a *mayor* of the borough of *Carmarthen*, it appeared, that by a bye-law made in the reign of Queen *Elizabeth*, the *right of electing a mayor* of the borough was vested in the *major part of the common councilmen*: that upon the day appointed by the charter for the election of a mayor, a *mob* took possession of the town-hall ; that upon the succeeding day, another mob did the same ; that upon the latter day J. S. was elected mayor by the burgesses at large ; that *J. N., who presided* at the election of J. S. was *not the next person in rank or office* to the present mayor: there being, at the time of that election, three other persons nearer in rank or office to the present mayor than T. N. That the *common council*, when *complete*, consisted of *twenty persons*, at this time *consisted only of eleven* ; and, consequently, that as not less than eleven common councilmen could elect a mayor, if a mayor was not elected before one of the present common councilmen should happen to die, no person, supposing the right of electing to be in the major part of the common council, could

* *Rex v. Newsham and others, common councilmen of the borough of Carmarthen, Say. 211.*

never be elected mayor. And by *Ryder*, C. J., the court does ^{George II.} not mean to give any opinion as to the right of election; but 1755. in whomsoever that may be, the election of J. S. appears clearly to be *illegal*. It was in a riotous manner; and the proper person who ought to preside thereat was absent. *The circumstance, that the common councilmen were reduced to the lowest number which could elect a mayor, was likewise of great weight* in the present case; for if the right of election were in the major part of the common councilmen, and any one of them should happen to die before there was an election of a mayor, there never could be an election; and, consequently, *the corporation must be dissolved.*

DURHAM.

In the case of the King against the mayor of *Durham*,* it 1757. appeared that the town was incorporated in the 44th of Elizabeth, by a charter from the Bishop of Durham, in which there was a clause, giving a power to "the mayor, aldermen, and 24 common council," to admit freemen, &c.: but that the bye-laws regulating this admission had been made by the "mayor, aldermen, and commonalty."

Lord Mansfield, in giving judgment, observed, "that the power of the select number is to make bye-laws, *not in their own names, but in the stead, for, and in the name of the whole.* Though, therefore, this law was really made by them, they might do it in the name of the whole."

IPSWICH.

A quo warranto had been filed against Thomas Richardson,† to show by what authority he claimed to be one of the portmen of Ipswich. 1758.

The defendant pleaded the charter of 17 Charles II., which, amongst other things, directed that the *portmen*, upon any vacancy, should be elected by the others, or residue of the portmen for the time being, or the greater part of them. The plea also stated the customary mode of election, and,

* Lord Kenyon's Rep. 524.

† 1 Burr. 517.

George II. amongst other things, that the portmen ought to be *resident*,
1758. *and inhabiting* within the town or borough. And also stated

the dismissal of certain of the portmen for not attending at the great court. And that the defendant, being a *burgess* of the borough, *resident* and *inhabiting* within it, and a fit and proper person to be elected a portman, was elected in the place of one of the portmen then vacant.

To this plea there was a general demurrer. The absence of the portmen from the great courts was held not to be a sufficient ground for removal; and there being, therefore, no vacancy, the defendant was held to be unduly elected, and judgment was given for the king.

A petition was also presented, at this period, to the House of Commons, against the return for this place, but as the question turned entirely upon *bribery* and *treating*, it affords little information upon the subject of our present inquiry.*

It appears, however, from the proceedings at this election, that upon a mistaken application of the determination in 1710, non-residents had assumed the right of voting: and the extent to which that prevalent evil had gone in this place is proved by the fact, that of the 297 voters for Mr. Cator, 139 only were resident, and 158 were non-resident.

The election was declared to be void: which shows the opinion of the committee, that the proceedings were unconstitutional, and contrary to the freedom of elections. One of the colourable modes of bribery which was then resorted to, was the payment of travelling expences, and the expence of living and loss of time, during the absence from home of the non-residents; some of whom received infinitely more than their travelling expences could, on the most exaggerated calculation, have amounted to.

The ready means which are afforded by the non-residence of voters, to the concealment of bribery and corruption, is surely one of the strongest reasons for rejecting their votes, in order that the law should not be supposed to sanction it.

* 1 Lud. p. 21.

NEW RADNOR.

An information, in the nature of a quo warranto, was ordered to be exhibited against Thomas Lewis, clerk,* to show by what authority he claimed "to make and swear free burgesses of the borough of *New Radnor*, without the concurrence of the bailiff, aldermen, and capital burgesses of the borough;" and an information was exhibited against him accordingly.†

1758.

The following cases will establish that the *court leet* was in full exercise in this reign; and will also show the course which was adopted, and the period at which it should be held; although, in this particular case, it was decided, that the rules relative to the leet did not apply.

Court leet.
1758.

An information in the nature of a quo warranto, was filed against the defendant for exercising the office of mayor of *Grampound*.‡ It appeared that it was a borough by prescription, and consisted of a mayor, eight capital burgesses or freemen, and an unlimited number of free burgesses or freemen. The question that arose was, whether the defendant, who had been legally sworn according to the provisions in the 11 George I. c. 4, rendered it necessary for him to comply with the following constitution of the borough: "That the person elected ought to be *presented* at the next *court leet*, before the *jury* of the court, which is holden always within one month after Michaelmas yearly, and to be *sworn* in and admitted before the town-clerk, or his deputy, at such court, which is holden always within one month after Michaelmas yearly, and to be sworn in and admitted before the town clerk or his deputy, at such court, in the presence of the preceding mayor; and that the defendant Nance was not *presented* at the *court leet*, nor *sworn* thereat."

Gram-
pound.Leet.
Jury.

But the court decided, the defendant having complied

* *Rex v. Lewis*. Cited 4 Burr. 2262, in *Rex v. Breton*.

† See before, *Rex v. Scolden and others*, Orford. ‡ *The King v. Nance*.

George II. with the statute, there was no obligation upon him to be presented at the *leet*.

1749. Again, an action of debt was brought for an amercement
Leet. in a *court leet*, under the following circumstances.*

It appeared that the plaintiff was seised of the manor of St. Giles-in-the-Fields, and that a custom existed for six ale conners to be appointed by the *steward*, who were to present any baker whose bread was deficient in weight; that at a *court leet* of the 15th of April 1746, six ale conners were appointed; and having gone to the house of the defendant to weigh his bread, he refused them permission, for which, at the next *court leet*, the defendant was presented to the court, who amerced him, which amercement was then affirmed by three assessorors at 39s.

1758. It was urged for the defendant, that the court leet was
Tourn. derived out of the tourn, and was a kind of inferior tourn,
Leet. granted to lords of manors, who otherwise were formerly
Jury. obliged to appear at the sheriff's tourn; and as the *jury* in the tourn were of the very essence of that court, so they must likewise be in the leet, which is derived out of the tourn:† and therefore it is contrary to law for six jurors to present offences in the leet.

The statute of Westminster, 2, c. 13, was made to prevent sheriffs in their *tourns* from fining without a *jury* of 12 men at least, and it extends to *presentments* in the *leet*; as Lord Coke, in 2 Inst. 338, expressly says: and that it is only declaratory of what was (before) the common law; for there is no saving of any customs in the statute. If this custom to present by six jurors was in this court leet before the statute, it is now abolished by it. If the leet was taken out of the tourn since the statute, this custom is bad, being contrary to it. The *steward* and *jury* constitute the leet, for without these it cannot exist; the *jury* is to present, and the court to punish; and a custom to take away the office of a judge and a jury of 12 men is against law.

The offence for which the defendant is amerced is not

* Duke of Bedford v. Alcock, 1 Wilson, 248.

† 2 Inst. 71, 72.

within the jurisdiction of the leet; for if it was, what occasion was there for the statute, 8 Anne, c. 18, which gives power to justices of the peace to enter bakers' shops, and weigh their bread; like the statute which gives a similar power to inspect apothecaries' shops. And this authority, given by statute, could never have existed at common law, for no man could enter another man's house; and if the defendant be obliged to permit his bread to be weighed in his own house, it would be for him to find evidence against himself. It was admitted they had power to prerambulate the leet, and might buy the defendant's bread; and if the same were under due weight, might convict him in the leet by a proper jury: but this custom to enter a man's house, in the manner it is laid, is very inconvenient, and inconsistent with the liberty of the subject.

George II.
1758.

Ford for the plaintiff. Court leets have been time out of mind: and it appears by our most ancient statutes, that they have had jurisdiction of almost all offences against the public.* A presentment by six jurors in the tourn would be bad; but it does not from thence follow that it would be so in the *leet*, for the words in Westm. 2. c. 13, "et sic observatus de quolibet balivo libertatis," do not include the steward of the leet.†

The only true standard and criterion of a court leet is the custom and usage of the place.‡ And where the custom only extends to affect the *person* by a jury of six, that may be good; but if the *freehold* be concerned, there must be a jury of 12. The presentment by six jurors is not conclusive; the party who thinks himself aggrieved may have a *replevin*.§ And an action of debt lies for an amercement in the leet.||

* Stat. 51 H. III. de pane et cervisia.

† Co. 2 Inst. 388.

‡ Keil. 140; 1 Roll. Abr. p. 11, 12; Hard. 56; Lane, 55, 56; Cart. 177.

§ Cro. Jac. 583.

|| Rast. 151; Old Book of Entries, 63 b; Cro. Jac. 582; 1 Brown Ent. 154, 168, 169, 170, 171.

IRELAND.

Dublin
oath.

To establish still further the identity of the Irish cities and boroughs with those of England, the following oath of the citizens of *Dublin*, which is dated in this reign, and the oath of *Bristol*, are here inserted

“ You shall swear that you shall be good and true to our Sovereign Lord King George the Second, and his heirs. Obeysant and obedient, you shall be to the mayor and ministers of this city; the franchises and customs thereof you shall maintain, and this city keep harmless in all that in you is; you shall be *contributory to all manner of charges*, within this city, as summons, *watches*, contributions, *tasks*, talliages, *lot* and *scot*, and all other charges; bearing your part as a freeman ought to do. You shall colour no foreign goods, whereby the king or this city, might lose their customs or advantages. You shall know *no foreigner* to buy or sell any merchandises, with any other *foreigner* within this city, or franchises thereof, but you shall warn the mayor thereof. You shall take no apprentice, but if he be *free-born*, that is to say, no *bondsman's son*; and for no less term than for seven years : within the first year you shall cause him to be *enrolled*, and at his term's end, you shall make him *free of this city*, if he have well and truly served you. You shall also keep the king's peace in your own person, and shall always, whilst you are able and in your power, keep a good musket, carbine, or fusee, in good, clean, and sufficient order. You shall know no gatherings, conventicles, nor conspiracies, made against his majesty's peace, but you shall warn the mayor thereof, or let it to your power. You shall not be free baker, butcher, or fisher, without you pay custom; and whatsoever office you be lawfully called unto within the franchises, you shall not refuse.

“ All these points and articles you shall well and truly keep according to the laws and customs of this to your power. So God you help, and by the holy contents of this book. God save the king.”*

* See Dr. Lucas's Letters.

The following is the substance of the oath for a burgess ^{George II.}
of Bristol. ^{Bristol}
oath.

“ You shall be true unto his Majesty King George III. And to the lieutenant master, mayor of the city of Bristol, and the ministers of the same, in all causes reasonable, you shall be obedient and assistant.

“ You shall keep the franchises of this city, and also the *king's peace* here, you shall endeavour yourself to maintain ; you shall be *contributory* to all manner of summons, as *watches*, taxes, *lots*, *scots*, and other charges within the city to your power, &c. &c.

“ You shall not colour the goods of any foreigner or stranger, or know any foreigner or stranger to buy and sell with another foreigner, within the precincts of this city ; but you shall give knowledge thereof unto the chamberlain or his deputy without delay.

“ You shall not implead nor sue any burgess of this city, in any court out of this city, for any matter whereof you may have sufficient remedy within the city.

“ You shall not take any *apprentice that is bond of blood*,* and none other, except he be born under the king's obeysance, and for no less term than seven years : and that he be bound by indentures, to be made by the town clerk of this city, for the time being, or by his clerk. And at the end of his term, if he have truly served you all his term, you shall, if he require you to it, present him to master mayor, or to the chamberlain, to be made a burgess.”

CLONMEL.

The following case relative to Clonmel, will also show that the proceedings with respect to the Irish boroughs, were, in all respects, similar to those in England.

Error of a judgment given in the King's Bench, in Ireland, against the defendant, in a *quo warranto* brought against

* See also before, the part of the oath for London directed to be omitted by the stat. 11 Geo. I. c. 18, 1725. See also another form of the Bristol oath, 2 Lud. 99, and also the Liverpool oath, ib. 101.

George II. him for *usurping the office of mayor of the borough of Clonmel. Clonmel.**
1737.

It appeared upon the special verdict, that the borough was incorporated by King James I., in the fifth year of *his reign*, by the name of ———: that the mayor, bailiffs, free burgesses, and commonalty, or the major part of them, were empowered to assemble themselves upon such a day, and choose one of the free burgesses, whereof there were to be 20 in number, for mayor; who was to be sworn into office before the mayor for the last preceding year, in the presence of the free burgesses and commonalty, or the major part of them. It was also found that *an ancient bye-law was made*, (without saying when) by the mayor, bailiffs, free burgesses, and commonalty, debito modo, directing that, from thenceforth, upon every election of a mayor, bailiffs, free burgesses, and commonalty, the mayor and bailiffs shall withdraw and nominate three out of the *free burgesses*, whereof one shall be elected mayor, and that no person not so nominated shall be elected. An act of Parliament, made in the 13th of Charles II., was also set out, whereby the lord-lieutenant of Ireland, for the time being, was empowered to make ordinances for the *government of the borough*; and in pursuance thereof, on the 23rd of September, 1672, Lord Essex, then lieutenant, made an ordinance, that on the election of any officers for the borough, the names of such persons should be, within ten days after the election, presented to the lord-lieutenant for the time being, for his approbation; and in default of such presentment or approbation, they should be incapable of acting, and the corporation might proceed to a new election.

It further appeared, that in 1725, one Hamerton was elected mayor, and approved by the lord-lieutenant; but a quo warranto afterwards was prosecuted, and a judgment of ouster obtained against him. And in 1726, three *free burgesses* were nominated for mayor according to the bye-law, which was the first instance, as far as it appeared by the evidence, of its having been ever exercised, whereof R. Moore

* The King v. Castle, Andrews, p. 119.

was one; and he was chosen mayor by some of the burgesses, and presented to and approved by the lord-lieutenant; and was also sworn into the office, and exercised it till the year 1727, when there was judgment of ouster against him; and it appeared, that at the time when Moore was chosen mayor, and also from that time to the year 1731, one Morgan was elected by the major part of the burgesses, but without any nomination or approbation by the lord-lieutenant; and other persons, from time to time, were also elected, and were nominated and approved, and acted as mayors; the last of which was said to be John Power. And, on the *charter day*, 1731, the defendant, a *free burgess*, was nominated, with two others, for mayor; and was chosen by some of the persons "who acted" as mayor, bailiffs, *free burgesses* and *commonalty*: Morgan being also elected into the office by the majority, without any previous nomination; and the defendant was afterwards presented to the lord-lieutenant, and approved by him, and was sworn, "as well in the presence of James Power, *quam plurimorum liberorum burgensium*;" and he exercised the office of mayor.

George II.
Clonmel.
1737.

The principal questions in this case were, 1st, *Whether the bye-law set out by the jury was a good one?* 2nd, Supposing it was, whether the defendant appeared to be regularly chosen and sworn into the office of mayor.

KINSALE.

The following letters will also exhibit the manner in which *non-resident* freemen were introduced into the borough of Kinsale, and their number increased, as well as the mode in which the influence in the borough was managed.

Letter from Mr. Edward Southwell, to General Parker.*

"London, 9th January, 1735-6.

"Sir,—Mr. Smith has sent me an account of the *election of the eight freemen I desired you to nominate, and I am glad I have been able to give your interest that additional strength.*

"This affair has given the corporation great alarms against

* Southwell MSS.

George II. me; and others of my friends have expostulated with me on a
 Kinsale. step taken without their knowledge; and the town has been very free with my character for *introducing so many new bur-gesses*, in violation of my own law of keeping all such out; which is no grateful return after five years' services and expence, and being a slave to all their wants and importunities, and their agent in every distress and application by sea and land, and here and in Ireland.

"I do not doubt of your being convinced of my having done my utmost for your service, and, as I have now raised your interest to the highest pitch I am able, you shall have the continuance of mine as an auxiliary, but I am not patient nor willing to bear the constant heat and fatigue of the day as the principal; and, therefore, if you think it worth while to support and carry on your own interest, you shall have my help and concurrence, but *the people are really grown so importunate to me in every shape, and think my interest equal to all they can wish or want, and that their corporation is dearer and superior to me than any return I can make, that I must withdraw myself from so great a dependence, and desire my liberty.* Your name and family is natural to them; your residence near them, and your character and behaviour will win them over to such a patron; nor will they be unreasonable in their demands from you, though they have no pity on me; and because I will not deceive and disappoint, they truly think I will not grant every request which it is out of my power to gratify. As to general services to the town in general, I shall be ready to do them all; but to satisfy the private views and ambition of every particular person for himself and family, it is impossible for the best interest to effect; and it is a drudgery I would not undergo for an estate: my choice and desire being, 'freedom and independence, more than any honour at the expence of both.'

"The town will be obliged to treat you in a more decent manner; and, therefore, if you will undertake the interest against Sir Richard Mead, you shall be welcome to mine. Had any vacancy happened, you would have been already in possession, but the thing is still in your power, if it is

but in your will, and you may reap the benefit of all my labours. George II.
Kinsale.

“I have not forgot your letter in relation to your brother, and assure you I should be glad to serve him; but, to deal truly with you, I am unable. I have relations now on my hands, whom I must provide for with my interest or my money; and they would be glad of such a place as your brother now has, and I have not been able to succeed; and for places of the value he desires and deserves, I am sure it is in vain to attempt them; and if I offered to deceive you both, I should not act as an honest man, or as becomes,

“Sir,

“Your affectionate friend and servant,

“Edward Southwell.”

General Parker, to Mr. Southwell.

“Kinsale, 25th January, 1735-6.

1735.

“Dear Sir,—I had the favour of yours, and told the people here the reason why you recommended the *making so many new burgesses*; and as it was at their own election whether they would agree to it or not, they have nobody to blame but themselves.

“I shall never desire you to break any engagement on my account, but I think there was no occasion to enlarge Mr. Stowell’s interest in this corporation, when yours, with the assistance I have always given it, could not be hurt. I believe Mr. Stowell to be a worthy man; but, remember, I tell you you are getting up another country gentleman—if I had a mind to put myself on the foot of my own interest, *I have it in my power to make as many burgesses and freemen as I pleased*; but as I have no view of my own, I shall not take any such steps.

“As I love to speak plain to my friends, I do assure you, if I should put myself out of the question, you would find your interest but very small here, and a good deal owing to your steward’s ill management; for I never knew any man so thoroughly hated since I was born as he is in this place, but I suppose you will discharge him,” &c. &c. &c.

George II.

Mr. Southwell, to General Parker.

Kinsale.

"27th January, 1735-6.

"Sir,—I received the favour of yours of the 25th, and I am obliged to you for every support you give my interest, but I must own I did not imagine you would seem piqued at my recommendation of *a few burgesses*, when I never took notice even of your choice of Sir Richard Cox, who distinguished himself against me, and is, and will continue so.

"You are pleased to bid me *remember your power of making as many freemen and burgesses as you desire*; and to tell me plainly that my own interest, without yours, is but very small at Kinsale; and, to speak as plainly, if my own interest is so inconsiderable and so dependent, it is not worth my while to undergo a constant trouble and expence for the support of a cause wherein I am only a nominal person, and my family interest must ever receive laws *from personal interest of every governor of the fort*, in return for my many services of all kinds to the town.

"If you please to oblige me, I should take it as a favour if you would concur in Sir Richard Mead and Mr. Stowell's dividing the corporation, and settling at once all these differences, and you shall come in at Down whenever a new Parliament happens. If you are determined to oppose Mr. Stowell, I will then make him the offer of Down; and as to my interest at Kinsale, it may e'en take its chance, and turn out as the people please, whenever a new election happens there; for, whatever my interest may be in the town, my interest elsewhere is of more consequence to them than their votes can be to me.

"It is my desire to act with honour both to yourself and Mr. Stowell, and to satisfy every wish you can have for yourselves, and every expectation from me; and, when my intentions are so very fair, I think I ought to have some little influence in the manner I propose of accomplishing these ends, and that all parties should in friendship concur in my ease and satisfaction, especially since all my engagements arose from the support of your election."

Mr. Edward Southwell, to General Parker.

George II.

“London, 7th February, 1735-6.

Kinsale.

“Sir,—Last night I received the favour of your most obliging letter of the 27th of January, and take the first opportunity to assure you the just sense I have of your honourable and candid behaviour to me, and think myself very happy that I have such a friend and gentleman to deal with.

“The freedom and liberty you have so generously granted me, will, I hope, turn as much to your advantage and satisfaction as it does now to your honour; for, I assure you, I will not consult my own ease and time without a due regard for you, and their resolution has really put me under more trouble and difficulties, and made me bear more inconveniences than my constant contest with my rival.

“I have been long convinced of the dependent situation of my interest at Kinsale—neither Sir Richard nor I can prevail against each other without the assistance of the governor of the fort. Either of us may have the honour of electing the governor, but neither can properly stand on their own bottom—our mutual and real interest was to keep together. Sir Richard was pleased to think and act otherwise, and I cannot, or ought not, to venture or depend on a treaty with him as safely as I could with Mr. Stowell.

“In order to satisfy the balance of power, I wrote a frank and free offer of my interest at Down, in August, 1734, in case of a new Parliament, in case I should bring in two members at Kinsale by his assistance. I owed all my engagements to you, and my sole view in mortgaging another borough was, that he might not be alarmed at my enlarging your interest, and yet you see how much he has resented making a few of your tenants free, even though I never yet took notice of his absolute choice of Sir Richard Cox, who has distinguished himself against me; who, as my design now is to oblige General Parker, has to declare plainly either to rest satisfied in the promise of Down, and to concur in my schemes at Kinsale for you, or else to abide by Kinsale, and leave Down free.

“If he chooses Kinsale, and the honour of a popular interest,

George II. *which will sound well at the castle, he is welcome; as it will be*
Kinsale. in vain for me to support an interest which must either be dependent upon the laws of the fort, or on any treaty with my rival, since I am an absentee: *and as to Down, it is a borough, the seneschal at my nomination—no election of annual magistrates—and no possibility of a contest;—but when a member of Parliament is chosen, my servant is the constant seneschal—almost every house and demesne are my own, and I have thereby made the townsmen so dependent upon me, and done the town such services, that although I never rely on gratitude from a multitude, yet I may depend on their not daring to disoblige me for their own interest,”* &c. &c. &c.

NEWTOWN.

Residence. In this same reign, an important case relative to the question of *residence*, occurred respecting *Newtown*, in Ireland, in which the disinclination of the court to give full effect to the objection, was still further apparent. This was the case of the *King v. Ponsonby*;* eight others occurred in this reign. It was a quo warranto information against the defendants, for usurping the office of *free burgess* of that borough; and judgment had been given against the defendants, in the court of King's Bench, in Ireland, upon demurrer. Against which judgment, a writ of error was brought in the King's Bench, in England, where it was argued three times, and upon great consideration, the judgment was reversed. One of the objections was founded upon

Non-residence. the *non-residence* of the defendant.

The Chief Justice in giving his judgment, first observed upon the nature of the judgment of ouster; after which he commented upon the ground of objection of *non-residence* as a good cause of amotion, the party having left the borough for four years, and gone many miles distant; upon which he stated that it was not necessary to give an opinion; because it was not a ground of ouster until they were actually amoved; and upon its being suggested, as the fact frequently has been, that a corporation might from some cor-

* 1 Ves. 1; 1 Lord Kenyon Rep. 1; Sayers, 245; 5 Bro. Parl. Ca. 217.

rupt motive, neglect or refuse to exercise that power, whereby ^{George II.} there might be a failure of justice;—the Chief Justice said, ^{Newtown.} that “it was not to be intended that the corporation would
 “act so corruptly, and if they did that, there would not be
 “a failure of justice, because a mandamus might in such a
 “case be awarded;” but in a previous case relative to *Truro*,* 1714.
 it had been held by two judges against the chief justice, that
 notwithstanding a charter required residence, non-residence
 was not an immediate forfeiture, but that there must be a
 previous amotion; for which reason a mandamus would not lie.
 As was subsequently stated by the court, with reference to
 the same place, in the first George IV.,† to which we may
 have occasion to refer hereafter.

In the course of the argument, the counsel cited Dr. Brady; and decidedly adopted his doctrine, that burghess- ^{Brady.} ship was to be referred to *trade*, and *not* to *jurisdiction*—an error which has already been observed upon.

This is not precisely the question—it is not a *forfeiture* by misconduct; but as far as the individual himself is concerned, a waiver of the franchise by changing his residence; and as far as the town and public are concerned, a cesser of his liability to the burdens of the borough, and consequently a cesser of his title to enjoy the privileges.

In the sequel of the argument and judgment, it will be seen that this distinction is important; as the oversight of it was the source of error, through both; and led to the fallacious assumptions which mainly contributed to the decision.

It was assumed that non-residence was merely an act of ^{Non-resi-} misbehaviour, for which no authority is stated; when in ^{dence.} point of fact, *residence* was not only the condition, but the very essence of being a *burghess* by the common law. The question therefore, which is founded upon this erroneous assumption, namely, whether it is a forfeiture or not, falls to the ground.

Another point raised in this case was, whether by the express or implied condition of the charter, *non-residence*

* *Rex v. Slade.*

† 3 B. & A. 590.

George II. was a forfeiture, or a determination of the title. If that
Newtown. point had been limited to the determination of the title to the franchise—omitting the forfeiture that would have been the real and indeed the only question—for, if it is a determination of the office or franchise, the subsequently using or exercising it is a usurpation, and might be inquired into by *quo warranto*. Whilst on the contrary, if the office or title to the franchise is not determined, then the original election being good, and the title continuing, the party cannot be disturbed by *quo warranto*—so that the third question is answered by the second, as stated before.

As to the argument which was used in the case, that if the crown gave the power of amotion, it would be inconsistent with it that any misbehaviour should be judged of before amotion:—it is probable that the learned counsel meant, that as the king by his prerogative, when he created the corporation, could appoint before whom the question of amotion from the offices of the corporation should be determined; if he gave that power to the corporation, it in effect, ousted the jurisdiction of the Court of King's Bench, till the amotion had been effected. If this was the drift of the argument, surely it is going too far to say, that the king by his charter could oust the interference of the Court of King's Bench, by the prerogative writ of mandamus, wherever the corporation failed to carry the king's charter into effect: or prevent the court from directing an information in the nature of a *quo warranto*, to be filed against a party who held an office contrary to the words of the charter.

In another part of the argument, the learned counsel is made to say, that the first question must depend upon the grant; but it is in terms referred to the common law, and properly so,—because none of the charters define the duties or privileges of free burgesses accurately. They depend upon the common law; as appears from the manner in which the question was put by the counsel: namely, whether the privilege of a burgess is of a local nature, or a mere personal privilege to be enjoyed in a particular place, and no more than a freeman; the answer to which must certainly be looked for in

the common law. If indeed the charters are referred to, the ^{George II.} strongest possible implication will arise from them, that the ^{Newtown.} very existence of a *burgess* is altogether local; as all their provisions are confined to the bounds and limits of the borough.

The assertion that the genuine meaning of the term "burgess," is a tradesman dwelling in a burgh, for the sake of traffic, is the gratuitous assumption of Dr. Brady; and can by no means be treated as the proper description of *burgesses*, at least in England, where they have existed from the time of Edward the Confessor, if not earlier. At which period, and indeed ever since, till usurpation in the time of the Stuarts, began to alter their character, their existence chiefly arose out of the existing system of *police*; and was most intimately connected with *local and privileged jurisdiction*. The authority referred to in Ryley's *Placita Parliamentaria*, appears not to justify the conclusion drawn from it. It is a petition of the mayor and *burgesses* of *Bristol*, ^{Bristol.} praying that the men who hold lands and rents of the masters and brothers of the temple, in the town of Bristol, (who clearly were not *burgesses*,) should contribute to the talliage of the king, for the town, with the *burgesses*, as they carried on merchandise, and used all the liberties and easements which belonged to the town. Which is in effect saying, that though they held ecclesiastical property, they so far gave themselves up to temporal affairs, that they dealt in merchandise, and therefore they ought not to enjoy the exemption of ecclesiastics; but as they enjoyed the privileges of the town, they should also share the burdens. Carrying on merchandise, is at all events, only one of the privileges the *burgesses* enjoyed, and certainly not their characteristic privilege; because many other places enjoyed it, although they were not boroughs. The authorities also quoted by Brady,* in the passage here referred to, by no means support his assertion, for they only show that markets and fairs were amongst the many privileges granted to free burghs; but by no means is this their characteristic

* Page 33, of the 8vo. edition.

George II. privilege; indeed it rather appears from some of the documents quoted by Brady, particularly the charter of Bridgewater, that the grant of a free market was distinct and separate from the grant of a free borough. Nor will the authority of Lord Coke, in the First Institute, establish this point, if duly investigated; for although he states
Newtown. roundly, that a *burgess* is a man of trade, yet there is nothing in the text of Littleton, which justifies that assertion, nor will his authorities support it. Bracton, as cited in the margin, only uses the word *burgesses*, without any allusion to trade; and indeed the passage in that author is only a transcript of the clause of the statute of Merton, which is quoted by Littleton in his text; 20 Hen. III., c. 6; which speaks of the lords marrying those whom they have in ward to *villains* or others, as *burgesses*. Glanville also, who is cited by Lord Coke, only uses the term *burgess*, adding that he is to be esteemed of age, when he knows how to count money, and to conduct his father's business; having previously stated that a military tenant was of age at 21; and a socage tenant at 15. Britton, in the passage referred to, does not mention *burgesses* at all; nor does the parliament roll. Lord Coke's assertion therefore, is by no means supported by his authorities, and there are many documents which raise a strong inference to the contrary. Thus, in Cotton's Abridgment of the Records, p. 18, in 13 Edw. III., the merchants are mentioned by name, as apparently a distinct class by themselves; and again p. 23 and 24, 14 Edward III.; and page 28, the merchants of cities and towns are mentioned; and p. 29, a merchant of Hull, and another of Beverley is spoken of, and nothing said of their being *burgesses*. In p. 39, 14th Edward III., the custom of wool is stated to have been granted by the *merchants*, which did not bind the commons.

In a variety of other instances in that and the succeeding reigns, the *merchants* are constantly spoken of; and that even in cities and towns, without any reference to their being either *citizens* or *burgesses*. The staple and the merchants are also mentioned; the former is appointed to be held in some places

certainly which are boroughs; but by no means in all the ^{George II.} places which are so. The charter in the 31st of Edward I., ^{Newtown.} to the merchant strangers, granting them certain liberties,* amongst other things enables them to deal (*mercari*), that is in gross, in all cities, boroughs, and merchant towns (*villis mercatoris*); which shows distinctly that the privilege of trading was by no means confined to cities and boroughs, but that it extended to other towns. Privileges are also secured to the merchants by the same charter, in all fairs and markets; which evidently are not confined to burghs; and the provision that in all places, there shall be a jury, half of merchants, if there are sufficient, and half of the *good and lawful men of the place*, seems clearly to establish that the men of the several places enumerated, were a distinct class from the merchants, who are described as a society of themselves.

Lord Coke, himself, in another part of his works,† seems, with much more propriety, to treat corporators as traders; which certainly is much nearer the fact, and more consistent with history. He speaks of *corporations* as trading into foreign parts, and at home; which, under the fair pretence of order and government, in conclusion tend to the hindrance of trade and traffique, and in the end produce monopolies; a thing in trade not even to be tolerated—but when it extends to power, influence, and the exclusive exercise of the elective franchise, it requires immediate suppression.

Lord Coke refers, as a further authority for his position, that a burgess is a man of trade, to the *Mirror*, chap. 2, sec. 17; that section, however, relates solely to burglary, and contains nothing of the kind. In the 28th sec. of the same chapter, which relates to *villainage* and *neifty*, *burgesses* are mentioned,‡ after describing villains as tillers of land, *dwell-ling* in upland towns, and so far showing that their class is denoted by their *residence*, it is added, “for of vill cometh villain, and of borough, burgess, and of city, citizen:” which, however, proves but little, any way—certainly nothing in favour of Lord Coke’s position. Page 114 speaks of the

* 4 Inst. 23.

† 2 Inst. p. 640.

‡ Page 113.

George II. ancient infeoffment, of earls, of earldoms—barons, of baronies
Newtown. —knights, of knights fees—serjeant, of serjeantries—villains, of villainages—burgesses and *merchants*, of boroughs—which, if it proves anything, shows that burgesses were not merchants; for the copulative conjunction here has the effect of importing a distinct class.

It was certainly common after the reign of Charles II. to be a *burgess* of several towns; because the king inserted in many of the charters he granted, clauses giving to the corporations the power of electing *non-resident burgesses*:—but it is contended that such clauses were void, and that the king had no power to grant such a privilege. Before that period, as far back as the reign of Henry VIII., it had been usual to admit persons as freemen of the trading guilds, whether resident or not; which no doubt might be done, as that was purely a *personal privilege*. The usurpation arose by giving the power of creating burgesses in the same manner, by assuming, as is here done by the counsel in his argument, that such freemen and burgesses were the same class of persons, which in fact they were not.

The customs of the Hanse Towns, which were referred to in the argument, can surely not explain the custom of England—particularly, for the purpose of setting up the doctrine of *non-residence*—so inconsistent with the general law of England and all its analogies.

Non-residence.

The authorities which were cited to support the doctrine, that being a burgess was a mere personal privilege, in no respect apply to that point. The first is the case of *Rex v. Glyde*,* relating to an alderman, and establishing that *residence* was necessary for that office, from the very nature of the thing. The same case as reported in *Skinner*, and which is also referred to, is, if any thing, directly contrary to this doctrine; for it shows that the privilege was purely local; as Lord Holt says, that “if a person removes with his family from a place, he ceases to be a citizen.”

As to the point which was raised, that the office was a freehold, and that some act of ceremony was necessary to

* 4 Mod. 36.

put an end to it; it should be remembered, that in cases of ^{George II.} incompatibility, nothing of the kind occurs, but the accept- ^{Newtown.}ance of the second office, is considered as effectually putting an end to the first. So also the argument derived from Magna Charta, that no man should be disseised of his free tenement, is not only a misapplication of that passage, but it is also answered by the observation, that the person who quits the borough and goes away, is not disseised, but puts himself out of the place.

Nor does the power of amotion affect the question, because that is applicable to cases of misbehaviour; and not to those of a removal out of the borough.

But it was said, that it would be impossible to ascertain when the forfeiture happened. However, the common law, and the practice of the *court leet*, would, in the course of its ^{Court leet.} ordinary jurisdiction, have ascertained the fact by the ^{Present-}*pre-*ment. ^{ment.}sentment of the jury, that the party had ceased to reside in the borough.

It was also contended to be absurd to say, that the forfeiture was inchoate, and that it could be ripened by time:—and yet this is the constant practice of the law with respect to settlements, which are by time consummated and destroyed.

The difficulty surmised of fixing the time when the forfeiture began, must be founded upon some supposed doubt in ascertaining when the person ceased to reside. If the question merely arose on *absence*, there is no doubt there ^{Absence.} might be some difficulty to establish the time when the absence should amount to a forfeiture; and therefore, absence ought properly to be treated as a fault, the extent of which should be considered by the corporation, and upon their sustaining an injury by the absence, they should necessarily have the power of relieving themselves from it by amoving the party. But *non-residence* is altogether a different thing. ^{Non-resi-} ^{dence.} An absent member of the corporation they might summon, and amerce if he did not attend; but a *non-resident* they could neither summon nor fine. *Non-residence* entirely vacates the office, and that from the time when the non-residence

George II. begins; which can always be readily ascertained; because
Newtown. non-residence at one place, implies residence at another.

But in fact, the law never had any difficulty in defining residence. On the contrary, it has for centuries acted upon residence;—in matters of police, by the law of the tourn and leet;—in matters of offices, from the earliest periods, as sheriffs, constables, justices, &c.;—and as rights, by fixing the persons over whom the county court has a jurisdiction, as in *Welch v. Troyte*;* *Tubb v. Woodward*;† and as to the jurisdiction of the court of requests in London, *Webb v. Brown*,‡ and *Brooks v. Moravia*;§ and as to Newcastle, *Busby v. Fearon*.|| As to the court baron of Sheffield and Eubsale, *Rex v. Danser*;¶ and respecting the University of Oxford, Lord Camden stated, in the case of *Hayes v. Long*, that “the consideration of the grant of the “charters to the university, was the condition of their residing “there.”

Notwithstanding the respect, therefore, which must ever be due to the decisions of the court of dernier resort in this country, yet it is justifiable with respectful discussion to canvass the propriety of the principles it has adopted.

After a careful investigation, therefore, of the grounds of this judgment, which seems to have been founded upon the erroneous doctrines of Brady; it may be suggested, that it cannot be maintained as a satisfactory decision, but the original judgment in Ireland, may be considered as the better determination.

* 2 H. Black. 29.

† 6 T. R. 175; see stat. of Westm. 1. cap. 35; 2 Inst. 229—231; Dalton, 14, p. 412.

‡ 5 T. Rep. 535.

§ 8 T. R. 236.

§ 2 H. Black. 220.

¶ 6 T. R. 242.

GEORGE III.

STATUTES.

In the third of George III., the mischiefs arising from the increase of honorary freemen, of which so many instances have been seen in the progress of this inquiry, had grown to such a height as to call for the interposition of Parliament. And an act was passed to prevent occasional freemen from voting, which recited that "great abuses had been committed in making freemen of corporations in order to influence the election of members to serve in Parliament, to the great infringement of the rights of the freemen of such corporations, and of the freedoms of elections; and for the prevention of such practices for the future, it was enacted, that no person claiming to vote as a freeman should be allowed unless he had been admitted to the freedom 12 calendar months before the election;" and such person is subjected to a penalty of 100*l*. But the act was not to extend to persons entitled to their freedom by birth, marriage, or servitude, according to the custom or usage of the borough; nor to London or Norwich.

1763.
Cap. 15.

This statute, therefore, distinctly confirms the position before taken, that the mischiefs had arisen from the abuses in making freemen; and they are properly described as an infringement upon the rights of the corporations, with a view of controlling the election of members to Parliament.

Had the real nature of the abuse been considered, and the municipal as well as parliamentary view of the question been taken, the remedy would not have been confined to the restriction in voting for members to Parliament, which left the municipal usurpation uncorrected; but the capricious and occasional making of freemen would have been altogether prohibited, and the admission by the presentment of the jury would have been substituted in its stead, which might now be re-adopted, though late.

George III. The period of 12 months was properly borrowed from the
 1763. common law; and the preservation of the titles by birth, marriage, or servitude, might also have been justified, had they been referred, as they ought to have been, to the general common law, and not as they are improperly in the statute, to the custom or usage of the boroughs.

Upon what ground London or *Norwich** could have been excepted from the statute, seems difficult to explain, as the mischief equally existed in both those places. Their exemption is probably to be attributed to vigilance or importunity.

The general observation, which would also apply to this statute, is, that it assumes the right of the freemen to vote; and so far sanctions that abuse, as well as the substitution of freemen for burgesses, contrary to the general tenor of the law—the charters—and the writs and precepts.

It is a curious fact, and establishes the danger of legislating upon any point with respect to which the common law is already plain, that the Durham Act was in the Bristol case, in 1775,† cited as an authority to support the votes of freemen who had been admitted after the teste of the writ—the evil the Durham Act was intended to prevent.

The next statute necessary to be remarked, proceeds upon the assumption of another legal error, that the *freeholders* had the right of voting in cities and towns, counties of themselves: in which the loose introduction of “town” instead of “borough” should not be overlooked.

Cap. 24. There is an act of the same year for the further prevention of fraudulent and occasional votes for knights of the shire, and counties of the cities and towns.

In the recital it justly adopts the principle, that it is essential both for the candidates and the electors, that the proceedings with respect to the qualifications of the latter should *be public*; and therefore recites, that the annuities

* Perhaps Norwich was excepted from the act, because in the same year a statute was passed to exclude all from voting as *burgesses* in Norwich who had not been admitted 12 calendar months; and the same observation may be applied to London. See before 11 George I. c. 18.

† See 1 Doug. 237.

and rent charges being of a private nature, are liable to George III.
fraudulent practices, to the prejudice of the candidates and 1763.
the electors. After which, contrary to the express words of the statute of Henry VI., it further recites, that "the right of election in cities and towns, counties of themselves, is vested partly or in the whole, in freeholders of 40s.;" when it is obvious, as before observed, that if the statute of Henry VI. applied to those places at all, the 40s. freeholders only would have had the right of election; and no such instance, it is believed, exists.

After these recitals provisions are made for preventing frauds in these respects, by requiring certificates upon oath, and memorials of the qualification.

In the 10th year of this reign, the important statute was 1770.
passed for the regulation of trials of controverted elections, which from the proposer, is generally called the Grenville Act, and which was intended to obviate the evils which had arisen from the previous imperfect mode of trying those questions.

Lord Glenbervie, speaking of the statute of George II. which makes the last determination final, says,* "that nothing but the gross and repeated contrarieties in the decision of the House previous to the passing of that statute, could have justified the clause rendering the last determination final;" an observation which the whole tenor of our inquiry has shown to be well founded in fact; but which seems strangely illogical in reasoning: for the gross contrarieties in the decisions upon points where the law would sanction and require uniformity, appears an extraordinary reason for perpetuating those contrarieties by making them final.

In truth, the real fault, from the beginning of these inquiries, arose from not investigating the subject historically, and generally from its commencement.

The same noble author attributes the law to which we have referred to the acknowledged caprice or corruption of the old judicature.

The evils, therefore, which demanded remedy, seem to

* 4 Doug. 79.

George I.H. have been allowed upon all hands; the question is, whether the course adopted supplied the remedy required.

The act recites, that "the existing mode of decision upon election petitions, frequently obstructed the public business—occasioned much expence, trouble and delay to the parties—was defective, for want of those sanctions and solemnities, established by law in other trials—and was attended with many other inconveniences." The time, therefore, for taking the petition into consideration—the method of balloting for the committee—and the persons who were to be eligible for that purpose—their number—with one nominee, to be appointed by each party—the mode of reducing the number balloted to 13—the appointment of a chairman—the power to send for persons and examine witnesses upon oath—and to try the merits of the return, and finally determine the seat:—these and some collateral provisions for regulating the proceedings, compose the statute.

As far as constituting a better tribunal than before existed for the trial of these questions, there can be no doubt but that this statute was very effectual: and with the modern improvements upon it, has produced an essentially improved system. But the grounds upon which that court was to proceed—the necessity of fully investigating the subject—and laying down principles which should be generally applicable—and instead of supporting the varying usages, restoring uniformity by disregarding them—was left unessayed, and to the present moment, no useful attempt has been made towards the correction of those abuses as far as the municipal rights are concerned: although the Reform Act has, to some extent, but without any previous investigation, or establishment of general principles, corrected some of the parliamentary mischief.

As far as regards the reducing the description of the Burgesses. *burgesses*, to one plain uniform rule, nothing was practically effected by the Grenville Act—on the contrary, the decisions which followed upon it, commencing with the Cricklade case—upon which we have already observed—and suc-

ceeded by the other determinations reported by Lord Gen- George III.
bervie, to which we may refer hereafter, were as much
characterised by variety and the absence of all general
principle, as those which had preceded them.

The 11th of George III., chap. 42, added some further 1771.
provisions to the last statute, merely for the purpose of re-
moving some difficulties in its execution.

And both these acts were made perpetual by the 14th of
George III., chap. 15, and was further amended by the 28th Grenville
Act.
George III., chap. 32; particularly providing against frivo-
lous and vexatious petitions, and directing statements of the
right to be given by the conflicting parties, when it was dis-
puted.—The 32nd of George III., chap. 1—34 George III.,
chap. 83—36 George III., chap. 59—42 George III., chap.
84—47 George III., chap. 1—and the 53rd of George III.,
chap. 71; were for the same purpose, and the whole were
at length consolidated in the 9th of George IV., chap. 24.

The 55th chap. of the same year, carried into effect the Shoreham.
resolutions of both the Houses, against the persons who had
participated in the corruption at *New Shoreham*, by incapa-
citating them from voting. And this act was still further
amended by enabling the freeholders in the Rape of Bramber
to vote. And, as a novelty, defining, by a legislative act,
the persons who were to vote for the borough of New
Shoreham, referring to the custom and usage in the borough,
and prescribing the oaths to be taken by them.

In the 12th of George III., an act passed for giving facility 1772.
Cap. 21.
Manda-
mus.
to proceedings upon writs of *mandamus* for the admission of
freemen into corporations, and, like other proceedings of the
same period, it recognizes the absurd distinction between *bur-
gesses* and *freemen*, and includes *towns corporate* in the pro-
visions, as well as the cities, boroughs, and cinque ports; and
provides, that every person who is refused to be admitted
a freeman after one month's notice of his claim, shall be
entitled to a mandamus, to compel his admission, and the
mayor is subjected to costs. It also provides for the inspec-
tion of the entries of freemen, subject to a penalty for
refusal.

George III.

1774.
Cap. 58.
Residence.

In the 14th of George III., an act was passed for repealing the statute of the 1st of Henry V., and so much of the 8th, 10th, and 22nd of Henry VI. as relates to the *residence* of persons to be elected members to Parliament and of their electors.

It recites those statutes, and, in an unprecedented manner, states, that the provisions in them have been found, by long usage, to be unnecessary, and "*were become obsolete*;" and, therefore, to obviate all difficulties upon the same, such parts of those acts as related to the *residence* of the persons elected or electing, were repealed.

Statute
obsolete.

This appears to be the only instance in our law of any statute being declared to be obsolete, and it is, in all probability, a precedent which will never be followed; for it is clear, according to the rules of the English law, that no statute can be obsolete by disuse.*

The former statutes were of a different description, and were founded upon the ancient and not the modern usage. The 23rd of Henry VI., chap. 14, recited the statute of the 1st of Henry V., and truly added, "that the citizens and "burgesses had always been chosen, in cities and boroughs, "by the citizens and burgesses, and none other." And reciting besides, the 8th of Henry VI., chap. 7, it then directs, that all those statutes should be duly kept in all points. And no doctrine can be more repugnant to the principles of the law that an act of parliament can be abrogated by desuetude, whatever dicta may be recorded to the contrary.†

It is not surprising that at the same time our Legislature should have declared one of our ancient laws to be obsolete, that it should also have sanctioned a departure from our ancient customs. Thus we find in a statute of this period, 1774. the freemen and burgesses are strangely confounded:—
Freemen. being first mentioned as "freemen" OR "burgesses," as if they were synonymous: and afterwards as "freemen
Burgesses. "AND burgesses," as if they were distinct classes; obviously a loose and inconsiderate mode of expression, and probably

* 2 Doug. p. 221.

† See the strong observations by Lord Glenbervie, 1 Doug. p. 341.

founded upon ignorance or misinformation of the real distinction between the two. George III.
1774.

This is to be found in an act for confirming to the *resident freemen or burgesses*, and the resident widows of deceased freemen or burgesses, their right to the herbage of the town-moor, &c. of Newcastle-upon-Tyne, within the liberties of the town; and the *freemen AND burgesses* are mentioned together in other parts of the statute.

This privilege, however, of participating in the enjoyment of the common, unlike the more valued privilege of voting for members of Parliament, was confined, as both ought to have been, to the *resident* freemen and burgesses.

The 21st George III., chap. 54, is a statute for regulating the elections for *Coventry*, and it recites the last determination of the right of election for that place, which is declared to be in the freemen, having served seven years' apprenticeship to one trade, such freemen being duly sworn and enrolled. And the recital continues that great *frauds and abuses* had been committed, in clandestinely admitting persons having no such right to the freedom of the city, during the last election, *in order to influence the election, to the great infringement of the right of the true electors, and in violation of the freedom of elections*; for the prevention of which practices it was enacted, that an open council should be held at St. Mary's Hall, in the city, on the first and last Tuesday in every calendar month; for the purpose on the first Tuesday in each month, of receiving and proclaiming aloud the names of every person, who should then *present*, or cause to be presented, an account in writing, of his claim to the freedom of the city; and for the purpose, on the last Tuesday of each month, of *admitting* those persons whose claims should be admitted. 1780.

The particulars of their claim being first verified upon oath, no greater fee being paid than 3s. over and above the expence of the necessary stamps. And no person was to be received, who did not produce evidence of regular indentures of apprenticeship for seven years, and declare upon oath the name of his master, the trade to which he served, the place of

George III. residence, &c. during the time of service, and at the time
 1780. of his claiming to be admitted. Lists of the claimants and those admitted, are required to be stuck up on the doors of the churches; and none are to be admitted after notice is given of any elections of members to Parliament, till after the final close of the election; and an oath is provided for the elector at the election. These provisions are enforced by penalties, and a strange proviso is introduced, that the act should not extend to any freeman, but such as had a right to vote for members of Parliament, assuming that there were two classes of freemen; as the general provisions of the act assume, with equal error, that the freemen were the burgesses; and the statute concludes with directing that the indentures of apprenticeship, should be registered with the town clerk.

The preceding acts had each of them advanced a little beyond the other in confirming some of the former usurpations. This statute goes still further, and adopting the freemen and the modern notions of the right by apprenticeship, connects the parliamentary right of election with *trade*, but still preserves the ancient requisites of their being *sworn* and *enrolled*.

The prevailing fault of all these statutes was, that they were founded upon the former errors, and confirmed them without consideration, and without any regard to principle or uniformity.

It is extraordinary, that having in view the public investigation of the claims of individuals to be made burgesses, and their public enrolment and swearing, that the Legislature should not have adopted the ancient, simple, and public method of *presenting*, *enrolling*, and *swearing* the *burgesses*, which had been practised in this country at the court leet for centuries, and even in this reign; and that they should, instead of it, have adopted the novel and imperfect mode described in this act.

1782. The 22nd George III., c. 31, was an act for the prevention
 Cricklade. of bribery and corruption at *Cricklade*, and added the 40s. freeholders of five hundreds to the former voters of that place

—an expedient highly objectionable, as it gives an unequal George III. ascendancy to freehold property in those districts; as a 40s. freeholder within them would have a right to vote for the county as well as the borough of Cricklade; and the resident owner of a freehold house in Wotton Bassett, being entitled to vote for that borough as well as Cricklade and the county, had six votes; giving a fictitious value to property in that place.

This act also erred in adopting the custom and usage of the place (the anomalous nature of which has been before pointed out) instead of reducing the right to some general and defined principle.

In the 26th of George III. the inconveniences were also 1785. found of having departed from the ancient system of having the *burgesses presented, enrolled, and sworn at the court leet*; and the general right of the inhabitant householders paying scot and lot being admitted without a due regard to the import of that qualification.

It therefore became necessary to check the evil of inhabi- Occasional Inhabitants tancy for the purpose of obtaining a vote, and, therefore, a statute was passed to prevent *occasional inhabitants* from Cap. 100. voting for cities and boroughs, which commences with a recital—that “it had frequently happened in cities and boroughs, where the right of election was in the *inhabitants* “paying *scot and lot*—or in the inhabitant *householders*—“*housekeepers*—*potwallers* legally settled, or in the inhabitants “—householders—housekeepers and potwallers; or in the inhabitant householders—*resiants*; or in the inhabitants,” &c. (which must be considered as so many terms descriptive of the burgesses)—“much trouble and litigation was created by the “occasional voters, to the great prejudice of the *real inhabitants who bear the burdens of such cities and boroughs, and* “*to whom the right of sending members to Parliament belongs.*” And the statute provides, that no person should vote under any of those descriptions of inhabitants, unless he should have been actually and bona fide such an inhabitant for six Six months. calendar months previous to the day of election, under the penalty of 20*l.* The proof of inhabitancy lying on the party

George III. claiming to vote. But the act was not to extend to any person acquiring the possession of a house by descent—devise—marriage or marriage settlement—or promotion to any office or benefice; and it was to apply only to such inhabitants as are mentioned in the statute.

It was a remarkable act of forbearance in the Legislature, when it became necessary to introduce into the recital of the act such strange descriptions of the *burgesses* as voters, that they should have refrained from putting an end to so complicated a system, by reverting to the ancient mode of defining residency at the court leet; and that the nature of scot and lot should not have been declared. This can only be accounted for, by a disinclination to affect the rights of election which had existed for some time, or an indisposition to trace those rights to their origin.

1792. In the 32nd of George III., an act was passed for the amendment of the law in proceedings in *quo warranto*, which recites that it would tend to secure the freedom of elections, and the *quiet, tranquillity and good order of* cities, boroughs, and towns corporate, if a certain limitation of time were established, beyond which no member or officer of any such place should be disturbed in the enjoyment of his office or franchise, which he should have enjoyed for such time, and gives six years as the limit for that purpose. It secures also derivative titles—and gives an inspection of the corporation books, under a penalty for refusal.

Quo
warranto.
Cap. 58.

This statute, though no doubt intended for the laudable purpose of checking litigation, nevertheless had the effect, to a considerable extent, of protecting usurpation, and giving an artificial sanction, after a certain lapse of time, of titles to offices, and franchises acquired without legal claim. And such must ever be the effect of fixed limitations. The dilemma between unrestrained litigation on the one hand, and protected abuses on the other, can never be reconciled, unless due precautions are taken before such statutes are passed, to place the rights in question upon so plain and simple a footing, that abuse or usurpation would be instantly detected and prevented. And under those cir-

cumstances, and those only, can an arbitrary line of limitation be justified. George III.

No such precaution was taken on this occasion; and therefore the statute has had a strong tendency to confirm usurped titles, and has led to some strange discrepancies in supporting defective claims, where others depending upon precisely the same grounds have been defeated.

PARLIAMENTARY CASES.

The same, if not greater variety in the determinations as to the description of "*burgesses*" who were entitled to vote for members of Parliament, is to be found in this reign as in the preceding.

SEAFORD.

Thus in the first year it was determined,* that the word "populacy," (a term totally unknown to the law, and with reference to our municipal institutions, so uncertain as not to admit of a definition), was declared by a committee to extend only to the *inhabitants, housekeepers, paying scot and lot*. A description of a burgess, perfectly in accordance with the common law, when taken with its necessary consequences of being *sworn* and *enrolled* at the court leet; but altogether distinguishable from the meaning of the word "populacy," according to its common acceptance. 1761.

A determination similar to the foregoing, was made in 1792 and 1795.†

In *Downton*, the right was limited to the burgage tenants.

1792.
1795.
1775.

MILBORNE PORT.

From the report of the case of *Milborne Port*,‡ by Lord Glenbervie, it appears, that the officers of the borough were appointed at the *court leet* held for the borough. A question arose as to the day for holding the court, upon which the right of the returning officer depended; and they resolved, that the return made by one of the officers was illegal—and two other returns to be so complicated together,

* 29 Journ. 89.

† 4 Doug. 506.

‡ 1 Doug. 97.

George III. that they thought it their duty to go upon the merits of the
 1775. election. And a question then arose, whether the nine bailiffs were entitled to vote; and as to the general body of the electors, questions as to rating were discussed; and the committee confirmed Mr. Luttrell, and Mr. Wolseley, in their seats.

WESTMINSTER.

To the peculiar circumstances of the city of *Westminster*, we have before referred; and the existence and general jurisdiction of the *court leet* within it, is recognized by an act of Parliament of George II.

In the 15th of George III., a case arose upon its election; in which, strange to say, considering the importance of this place, Lord Glenbervie remarks, that there had been no general determination as to the right of election for *Westminster*—and, with a singular want of precision, it is added, that “it seemed to be agreed to be in the inhabitant householders paying scot and lot.”

1680. The necessity of the *burgesses* being *householders* appears to be confirmed by the resolution in 1680—that the king’s menial servants had no right to vote, because they had no proper *houses* of their own within the city.

The reader will probably remember, that in almost all the instances of ecclesiastical establishments, of which *Westminster* was one, the inhabitant householders paying scot and lot have been established to be the *burgesses*; as in *Evesham*—*Abingdon*—*Reading*—&c. &c.

BRISTOL.

At *Bristol*, the mischief that was complained of in the *Durham Act* appears to have been carried to a great extent; as it is stated, that in order to influence the election, great numbers of persons were admitted to the freedom of the city, after the date, and issuing forth of the writ.

Lord Glenbervie also states, with respect to this important place, with similar indistinctness, that there appeared to be no determination as to the right; but that “it seemed to be

“ taken for granted, on both sides, that it was in the freeholders George III.
 “ having freeholds of 40s. a-year, and the free burgessesa.”

The impropriety of the first part of which definition of “ *burgesses*,” there has been before occasion to observe; the latter is the proper common law description, if it had been applied in its purity.

In order to show the extraordinarily varying grounds upon which any usage claimed, was attempted to be justified, the objection to the freemen admitted after the teste of the writ, was founded upon a supposed custom at Bristol, instead of being assigned, as it ought to have been, to the general principles of the common law, prohibiting occasionality.

It is impossible to read this case, without being satisfied that the greater portion of the abuses which became prevalent in the different boroughs, arose from the ancient method of admitting burgesses at the *court leet* being abandoned, and the introduction of the system of *making* burgesses; and that if the former ancient practice had been continued, all these abuses would have been prevented.

RADNOR.

In *New Radnor*,* it may be collected from the report, that the committee held, that the burgesses who did not reside, as well as those who did, had a right to vote; a decision in opposition to the general history of burgesses.

DORCHESTER.

There is scarcely any place which affords a more striking 1791.
 illustration of the strange descriptions which have been given of the term “ burgess,” than *Dorchester*;—none in which more marked traces can be found of its having possessed those Burgess.
 ingredients upon which the modern rights of burgess-ship have been founded; though it still preserved some features of the ancient municipal institutions, disfigured by a series of absurd departures from its simplicity, which are to be attributed to the disregard of the real question—who were the burgesses?

* 1 Doug. 317.

George III. There are in this borough decisive traces of *burgages* held by *burgage tenure*:—and in the reigns of James I. and Charles I., express charters of *incorporation* were granted, in the common form in which other boroughs were incorporated. In the charter of Charles I. the *freemen* are mentioned as well as in subsequent documents, and their oath is spoken of; and yet in this place, neither the burgage tenants nor corporators vote as burgesses.

Early history. The *early history of Dorchester* runs back to the most remote antiquity.

It appears to have been a station of much importance, as far as any inference can be drawn from the remains in the neighbourhood of it, even in the time of the Romans.

Romans. In the reign of King *Athelstan* two mints were ordained there, which appear to have continued till the time of William I., as they are mentioned in his survey.

It is said to be a borough by prescription; and is mentioned in Domesday* under the terra regis, as a place of importance, and its customs are enumerated, but it is not called a borough.

It returned members to Parliament in the 26th of Edward I.

Its ancient presiding officers were the *bailiffs*;† and the burgesses were, at that time, called, as was common, “the good men. *good men of the borough*.”‡ We have also seen in the reign of Edward III., a grant to the burgesses, and that they presented a petition to Parliament in the reign of Henry VI.§

1604. In 1604, a person is described in a certificate returned to Parliament as being, “according to the strictness of the Resiant burgess. “late proclamation, a *resiant burgess*, but that he was unable “from illness to attend, and therefore the burgesses request “that another writ might issue, for them to elect another “person.”

1720. In the seventh of George I., the burgesses were described to be the *inhabitants* paying to *church* and *poor* in respect of

* See before, p. 158; and see Gale's Hist. Angl. Script. vol. iii. p. 764.

† See before, p. 594, and Fine Roll, 17 Edward II.

‡ See before, p. 654 n.

§ See before, p. 854.

personal and real property—which was also again *agreed* to be the right of voting in the ninth of George I. George III.
1722.

In the 15th of George III., this borough came again before a committee.* The petitioners contending that the latter part of the resolution in 1720, related to the *occupiers* only; whereas the sitting members maintained that it meant the *owners*. The case was discussed at much length; and the committee resolved, that the persons who paid church and poor rates, in respect of their real estates, were entitled to vote, though they were not inhabitants or occupiers: which was also adopted by another committee in the 31st of George III.† 1775.

1796.

TAUNTON.

As to *Taunton*, where in a former resolution, in 1715, the persons entitled to vote as the *burgesses*, were described as the *inhabitants* being “*potwallers* ;” it was in the 15th of George III. agreed, that a “*potwaller*” was a person who furnished his own diet, whether he was a *householder* or only a *lodger*.‡ Potwaller.
1774.

This explanation, therefore, added to the former, and with the further qualification of possessing a parochial settlement, (which was also agreed on the same occasion), must be taken as containing the full description of a *burgess* of Taunton. The right of *lodgers* is clearly contrary to the early laws against inmates, which continued in force for many years, and was a frequent subject of parliamentary inquiry and determination in the reign of Queen Elizabeth. In 1689, in the Cirencester case, lodgers were expressly excluded from voting. And it is impossible to suggest any valid ground upon which *inmates* or *lodgers* could, at *Taunton*, be entitled to be considered as *burgesses*; whilst the contrary was the law at *Cirencester*. Burgess.
Lodgers.

Cirencester

It should be observed also, that the payment of *scot* and *lot*, the general common law requisite, was not held to be a necessary qualification at Taunton. Scot and
lot.

* 1 Doug. 347.

† 4 Doug. 482; 48 Journ. 281.

‡ 1 Doug. 370.

George III.

SHREWSBURY.

Shrewsbury also affords another singular instance of the manner in which the *burgesses* have been defined. It is a borough by prescription: its *burgesses* are mentioned in Domesday. In the reign of Henry II., all were prohibited from selling within the borough unless they were in *scot* and *lot*, and in assises and talliages with the *burgesses*.^{*} A charter, similar to that of Lincoln, was granted to the *burgesses* in the reign of King John, which was confirmed to them and their *heirs* in the reign of Henry III.; and the persons inhabiting and dwelling within the town are recognized as the *burgesses*. It sent members to Parliament in the reign of Edward I. before it was incorporated.

1604. In 1604, double returns were made by the bailiffs and
1709. *burgesses*.

In 1709, the petitioners insisted, according to the common law, upon the right of the *burgesses* paying *scot* and *lot*, and living within the borough.

The sitting members contended for the *burgesses*, both resident and *non-resident*. And returns were produced in evidence in the reign of Queen Mary, by the *burgesses* and *commorants* within the town.

Parol evidence was given for the sitting member, that the out-*burgesses*, or country *burgesses*, had voted.

The committee properly confined the right to the *burgesses*, only *inhabiting* within the borough, and paying *scot* and *lot*.

In 1713, the petitioners insisted upon the right of the *burgesses* at large—the sitting member, on the *burgesses* inhabiting and paying *scot* and *lot*, according to the former determination.

In the course of the evidence it appeared, that the returns had properly been always made by the *burgesses*. And the committee also correctly decided, that the right was in the mayor, aldermen, and *burgesses*.

In 1723, the same question was again agitated; the returns

^{*} See before, pp. 142, 259, 342, 388.

in the time of Queen Mary by the *commorants*, and the former decisions, were given in evidence, as well as some other returns, made by the *commonalty* of the borough. And it appeared distinctly, that before the incorporation the returns were by the "bailiffs and burgesses," and after the incorporation by the "mayor and burgesses." It was said, that in the reign of William and Mary, some burgesses, not inhabitants, were allowed to vote. And in the reign of Henry VI., some ordinances were referred to, by which it was directed, that the commons assembled together on the ringing of the *common bell* should choose the members to Parliament. That the inhabiting burgesses have a cow's pasture, which foreign burgesses have not. That foreign burgesses did not pay tolls; but if they came to live within the town, they had all the privileges of other burgesses.

George III.
1723.

Common
bell.

An act of Parliament of the sixth of Edward IV. c. 1, s. 17, for the confirmation of their bye-laws, was referred to; one of which was quoted; and, according to the ancient principles of the municipal institutions, related to the conservation of the *king's peace*, reserving the rights of persons *born* in Shrewsbury, but *residing* out of the borough.

The committee resolved again, that the right was only "in the burgesses *inhabiting* paying *scot and lot*."

Inhabitants

Some questions afterwards occurred respecting the boundaries of the borough, but they are immaterial to the present inquiry, excepting that a charter of the 11th of Henry VII. was given in evidence, which granted to the bailiff and burgesses a view of *frankpledge*, and the *return of writs*.

1495.

Frank-
pledge.

And a charter was also given in evidence of the 28th of Elizabeth, which recites, that the *inhabitants* had extended their buildings into the adjacent villis; and for putting the *inhabitants* of those villis under the same jurisdiction as the town, it was ordained, that the *freemen and burgesses* of the town, suburbs, and parishes named, should be incorporated, by the name of the bailiffs and burgesses of the town. And the same privileges are granted to the *inhabitants* of all those places, as had been before enjoyed by the burgesses of the borough.

1585.

Inhabitants

George III. 1723. No charter could possibly be framed more entirely in accordance with the common law than this of Elizabeth, which might form a fit model for such grants even at the present day. It added the inhabitants of the adjoining villages to the burgesses of Shrewsbury, and put them all under the same jurisdiction:—as Edward IV. united the inhabitants of Southtown to Dartmouth.*

This charter described the objects of the grant as “*the free-men and burgesses*”—that is, the *liberi homines*, or men of free condition, who inhabited within the borough, and, therefore, were called “*burgesses* :” and the *liberi homines*, or *freemen* of the villages, which not being before any part of the borough, were not called burgesses, but only *freemen*, till after the clause of incorporation, by which they were added to the borough, and then were incorporated by the name of the “*bailiffs and burgesses*.”

1638. A charter of the 14th of Charles I. was also given in evidence, which recited the former one of Elizabeth, and incorporated the burgesses and *inhabitants* by the name of the mayor, aldermen, and burgesses.

An old book was also produced, beginning in the reign of Richard II., for the purpose of showing what vills and hamlets were within the liberty of Shrewsbury. But the committee decided that the parishes were not within the borough.

In the further course of the evidence, it was said, that a select committee had been appointed for admitting burgesses, for the purpose of carrying the election;—another instance of the abuses which arose out of the unrestrained right of making freemen.

1775. In the 15th of George III., the decision of 1723 was read; but the petitioners insisted upon the votes of some persons who had been rejected as freemen, but who were stated to be entitled to their freedom by two immemorial customs—
 Appren- one in favour of *apprentices* for seven years to one of the
 tices. trades of the 14 ancient companies; and the other in favour
 Born. of those *born* within the borough.

* See before, p. 975.

These supposed customs were afterwards tried upon a ^{George III.} mandamus; and at the trial it was said, that they had their origin in bye-laws of 1642 and 1753: which, however, was argued, upon the other side, to be only declaratory of the ancient custom. The jury, however, found in favour of the customs; and a similar verdict was given upon a second trial.

1642.
1753.

The reader who has pursued this inquiry from the early periods of our history, will readily perceive how much these cases were misunderstood, by ascribing to particular local custom that which was derived from the general law: and by not adverting to the real nature of these supposed rights, the one was improperly mixed up with the trading companies—and the other as improperly attributed to the simple fact of birth within the place; instead of referring the right, according to the general law, to the birth from free parents.

The committee, however, considered the verdicts given in this case as conclusive; and supported the votes of the persons who had, on those grounds, claimed to be admitted as freemen.

HELSTON.

The impropriety of attempting to remedy the fraudulent making of freemen for election purposes, by prohibiting them from voting if they had not been admitted 12 months, has been already pointed out—as well as the more effectual remedy, of altogether preventing the arbitrary selection of freemen, by restoring the legitimate *presentments* at the court leet.

Present-
ments.
Court leet.

An unexpected result from this statute, occurred about twelve years after it was passed in the case of Helston, where a new charter which we shall mention hereafter, being granted in consequence of the incapacity of the corporation to act from a defect of their numbers, an election occurred before twelve months had expired from the granting of the charter, under which many freemen had been created:—and the question arose, whether persons so made burgesses by the charter, were within the operation of the Durham Act,

George III. and the committee held that they were ; so that the act of the king was held to be within the fraud contemplated by the preamble of the Durham Act. The result was, that the small body of the whole corporation, who had negligently or wilfully allowed that body to get into such a state, that they were incapacitated by law to act, were suffered to return the two members to Parliament.

By which means it is obvious, that the whole subject was involved in unnecessary difficulties ; when if the common law had been preserved in its purity, none would have arisen.

The burgesses would, at the annual court-leet, have duly presented all their officers, as well as persons who were by the law qualified and bound to be burgesses, and there would have been no necessity for a fresh charter by the crown. But if such a charter were granted, it should have been for the mere purpose of restoring it as a borough ; and, on that account, should have continued it as separate from the county, and by incorporating the burgesses, have given them the power of enjoying their rights in perpetuity, the burgesses being defined by the court leet. Under which circumstances, no such incongruous question could have arisen as to the exercise of the prerogative in granting a charter to the place.

BEDFORD.

1705. In the case of *Bedford*, in the same year, a whimsical distinction is stated by Lord Glenbervie, between a "burgess" and a "freeman;" that all the sons of the former are entitled to be burgesses, but only the eldest of the latter:* how totally such a distinction is without the pretence of any support by the general law, has been already abundantly shown.

1690. On the behalf of the petitioners it was contended, that the requisite of being *householders*, according to the last determination in 1690, applied as well to the burgesses and freemen, as to the inhabitants ; which was discussed at much length. The committee permitted evidence to be given,

* 2 Doug. 70.

for the purpose of establishing the *usage* subsequent to the last resolution; with which the committee were satisfied, in favour of the non-resident votes. The usage spoken to, however, was only for a period of 40 years. Objections were then taken to the votes, on the grounds of their being *honorary burgesses*, and *occasional*, but they had all been made more than a year, and were not within the Durham Act.

George III.

Usage.

Honorary
burgesses.

To establish these points, evidence was given, that in 1654, Sir Bulstrode Whitelocke was admitted. And six others, who had been admitted gratis in 1656, were declared to be improperly admitted, because they were introduced by force, fraud, and surreptitiously, contrary to the rights, customs, and privileges of the town; and therefore they were not to be of the guild, but to be considered as foreigners.

1654.

1656.

In 1769, five hundred freemen had been objected to as non-residents, and who were made on paying one guinea.

1769.

On the other side, evidence was given of entries from the borough books, commencing in 1654, for the admission of persons who had no previous title, without the payment of any fine, or even of the usual fees.

1654.

The committee decided, that "the being *householders* did not refer to the burgesses and freemen, but to the inhabitants only." So that this substantial qualification, upon which so much of the application of the common law depended, of being *householders*, was held to be requisite for the inhabitants, who were the persons for whose benefit the privileges of the borough were granted, but was not required for the burgesses and freemen, who were persons to be made at the will of the corporation. In truth, the burgesses ought only to have been one class, and all these supposed distinctions between burgesses, freemen, and inhabitants, have no substantial foundation in law.

Right.

House-
holders.

The committee purposely abstained from delivering any opinion in favour of the right of the corporation to receive honorary burgesses.

George III.

WIGTOWN.

As to the case of *Wigtown*,* it should be observed, that by the statute of the seventh of George II., it appears that the chief magistrates of the borough should be "*resiants*" within it, as well as the counsellors, whose *dwelling places* are spoken of.

It appears by the warrant for a poll election, in Scotland, *honorary burgesses* are expressly excluded from voting.†

And the election for magistrates, in Scotland, appears to have been popular.

POOLE.

Upon a *petition* against the return for *Poole*, the petitioners insisted upon the right of the *inhabitants* and *householders paying scot and bearing lot*.

The sitting members insisted upon the exclusive right of the burgesses.

The counsel for the *petitioners* relied upon the doctrine in *Glanville*, in the *Cirencester* and *Pomfret* cases, and in *Whitelocke's Commentary*; and the definition of a burgess in *Spelman's Glossary*, and *Madox's Firma Burgi*.

In the course of the argument it was asserted, that the doctrine of *Glanville* could not be maintained or deduced from history; but it has been shown in the progress of this work that it can be so supported. It was said that the early periods of representation were too obscure to authorize any general system; but documents and authorities sufficient have been adduced to show the general application of the law, and of the term burgess, as the foundation of *one uniform right* of burgess-ship.

The counsel for the *sitting member* said, that the right of election in *Poole* did not depend upon any of the charters which had been produced, but on prescriptive right, which was not the fact; because if it had been, it was an argument which, if rightly apprehended, should have weighed for the petitioner; for if it were a prescriptive right, it must have

* 2 Doug. 187.

† See Wight, App. 389.

existed in *burgesses* before the time of Richard I., and no authority can be shown for disputing that *burgesses* were George III. 1775. **THEN** the inhabitants of the boroughs.

The sitting member's counsel also said, that though "*burgenses*" and "*communitas*" might in some boroughs comprehend all the inhabitants, there were many more instances where they were used for a limited part of them. The answer to which is, first—That "*communitas*," unless it means the same as *burgesses*, has nothing to do with the election of *burgesses* for Parliament, by *burgesses*. If it meant the same as *burgesses*, then the question falls to the ground; and as to the ancient application of the term, it is denied that it ever was referred to a limited portion of the inhabitants, otherwise than as exclusive of peers, women, minors, villains, ecclesiastics, &c. Communitas.

The counsel mainly grounded their case upon the *usage* of the place. The proper doctrine of *usage* has been already sufficiently stated, and the reader himself can readily apply to it the facts of this case, and ascertain if it affords any ground for the determination of the committee. Usage.

The tautology of charters might in truth well be insisted upon; but it would have been difficult to show how that argument could have helped the sitting members. Charters.

It was also truly observed for them, that the corporation might have certain corporate rights and franchises under the charters, and yet not have a right to vote for members of Parliament. That is undoubtedly true; because corporations really had not any thing to do with the elective franchise; and it would be incongruous if they had, because as they were the creatures of the crown, it would in effect place the elective franchise at the mercy of the executive. Corporations.

It seems altogether to have been overlooked in this case, that the last irresistible argument by the counsel for the sitting member, was directly against the right claimed by them; namely, the corporate right.

The parol evidence in that case, on either side, is too recent and unsatisfactory to require any comment.

George III.

Common
seal.
1775.

It was confidently asserted, that there was no instance of a common seal belonging to inhabitants at large. It will be recollected, that it has been before shown that there were many instances of that kind.*

It is therefore submitted, that the decision of the committee in this case, was erroneous.

And it will be seen, that there is some reason for thinking that Lord Glenbervie was of that opinion—for at the end of the case, there are added in the notes by that learned nobleman, the cases of *Boston*, *Bridport*, and *Warwick*—which go a great length to establish the error of this decision, and to prove that no *usage* within time of legal memory, can narrow the right of election;—as also to show (which is material in the case of Poole) what occurred immediately after the decisions reported by Serjeant Glanville, and in those better periods of our parliamentary and constitutional law, as to the interpretation of the word “commonalty.”

1776. An inhabitant householder of Poole, in Easter Term, 17th George III., moved the Court of King’s Bench, for a *mandamus* to the *corporation* to admit him to the *office of freeman*,†

Inhabitants

it being contended, that the *inhabitants* were an integral part of the corporation, under the name of “commonalty.” That the corporation in its origin consisted of all the inhabitants, and no mode was provided in the institution for continuing the succession. That according to the constitution of the town, *burgesses and inhabitants were synonymous* terms, and the governing part of the corporation could not withhold from the latter their privileges. Lord Mansfield refused the

Usage.

application, because there was no *usage* alleged in favour of the claim, the borough being prescriptive; and as the charter contained no directions about the electing or admitting freemen, or burgesses, usage alone could explain what the privileges were, when the charters were silent; and he added, that the claimants wanted no admission at all, if their construction of the charters were right; but became

* See 2 Lud. 199.—Aldborough—Preston—Windsor—Bridport—Shaftesbury—St. Germain’s—and see before, pp. 443, 495, 555, 1370.

† Surely a *freeman* cannot be said to be an officer.

entitled to the privileges they claimed, ipso facto, by being ^{George III.} inhabitant householders. _{1776.}

The same error appears to have been committed in this motion, as by the petitioner in the election case, by placing it on the ground of a corporate right, and relying upon the charters, when it should have been rested upon the common law; and then the reason given by Lord Mansfield, for refusing the motion, would have operated the other way. The *usage* against the common law, should have been shown, by those who strove to except themselves from it; and for that purpose, it must have been some usage existing time immemorially, or at least, a usage so proved, as to raise the presumption that it had been immemorial. The observation of Lord Mansfield, as to the charters being explained by usage, is certainly accurate, if the right was claimed under them; but being a prescriptive right, as observed by that noble lord himself, it stood aloof from the charters, and its prescriptive character, instead of being an answer to the application, should have been the strongest reason for assuming that the inhabitants were entitled to be burgesses; because, at the time of legal memory, burgesses were the inhabitants of the boroughs.

As to the further observation of Lord Mansfield, that the claimants required no admission,—it is with submission urged, that he must have overlooked that by our early law, and even by modern statutes, *inhabitants* were not recognized, without some enrolment, or notice of their inhabitancy: and there can be no doubt, but that before the time of legal memory, it was necessary for them to be *presented, enrolled, and sworn at the court leet.* Inhabitants

Another petition was presented against the return for this borough, under which the petitioner insisted, that the inhabitants *householders*, within the borough and county, paying scot and bearing lot were, as such, *part of the corporate body* of the borough, and legal voters. 1791.
Householders.

Other petitioners stated the right to be in the mayor and burgesses only: and the sitting member stated the right in the same way, which was confirmed by the committee.

- George III. The statement of the first petitioners was incorrect in
1791. claiming the right for the inhabitants as corporators ; and the determination of the committee, fixing it in the *mayor* and *burgesses*, is, undoubtedly, accurate in terms. But still the question remains, who are the burgesses? certainly not the corporators ; but the *inhabitant householders, presented, enrolled, and sworn* at the *court leet* ; so being *the free and lawful men** (*the liberi et legales homines*), and, as such, paying scot and bearing lot.

CARDIGAN.

1775. In a case respecting *Cardigan*, at this period,† the two courts of the borough are mentioned, the one called the town court,
- Leet. for the trial of civil actions; the other, the *court leet*, which is holden twice a year, at Michaelmas and Easter ; the mayor
- Steward. acting as *steward* there, and a *jury* of burgesses is sworn to inquire into all matters belonging to the borough. It is said, Jury.
- Present. that “ new burgesses are, properly speaking, elected by the “ jury, for they *present* such persons as they think fit to be “ made free of the borough :” thus—“ We *present* I. F. to be “ a burgess of the borough of Cardigan ; and the person so “ presented might come at any future time and take the oath “ of a burgess, which is administered by the town clerk, in “ the presence of the mayor. No previous title‡ is necessary “ in order to be made a burgess ; and it appears to have been “ the *usage* to adjourn the court leet for the purpose of pre- “ senting burgesses.”

- This appears to be, in substance, an accurate description
- Court leet. of the proper proceedings at the court leet of a borough, according to the ancient common law ; excepting that, as usual, it is in some slight degree perverted : as for instance,
- Jury. it is stated, that the jury had the power of *election*, because they could present such as they thought fit. If that meant,

* A return in the 14th of Elizabeth, 1572, was by many persons named, who were described as “ free and lawful men, dwelling and residing.”

† 3 Doug. 175. .

‡ The statement as to “ no previous title being necessary,” must be taken in a qualified sense, viz., that he must be an inhabitant householder within the borough ; but no further qualification was necessary.

as we have had occasion before to observe, that they had the power of arbitrarily and capriciously electing whom they thought fit, it is an incorrect statement of the law, and cannot be supported. But if it means that they had the power, *according to their oaths and their consciences, to present* such persons, suitors at their court, as resiants, whom they thought *fit* and *proper* to be burgesses, then it is an accurate statement of the law; and the further assertion, that no previous title was necessary, is also correct; as well as that no title could give them an absolute right, because their being or not being admitted as burgesses, must, after all, depend upon the *judgment* the jury should form of their fitness for being burgesses, by station, condition, and character.

George III.

1775.

Election.

Present-
ment.

It is also stated, that the burgesses were originally *presented*, *sworn*, and *enrolled* in the court leet book, upon a list called the *suit roll*, till the new system was resorted to upon the passing of the stamp act. Opposite the names of the persons was written, "*Jur*," or "*S*." And after some, "*A*." and "*S*," which were explained to mean, "appeared and sworn." Against some, the letter "*R*." is written, which, formerly, meant "rejected;" but in more modern presentments it meant "registered."

In 1653, a common council, which was no part of the ancient constitution, was established in the following manner.

1653.

At a court leet, the jury presented that it was necessary that a council of twelve, being aldermen, and sufficient burgesses, should be added to the mayor, to advise him for the good of the borough. Twelve persons were accordingly named in the *presentment*, and were the first "common council;" and vacancies by death were afterwards *presented* by the jury, and filled up from time to time, by the majority of the survivors.

Common
council.

Aberystwith, which was one of the contributory boroughs, had also a *court leet*, likewise holden twice a year, the mayor being the presiding officer.

Aberyst-
with.

Leet.

Lampeter and *Atpar*, possessed similar privileges; the portreeves presiding, and the burgesses being presented by

Lampeter.
Atpar.

George III. the jury in the same manner, and they were alleged to be
1775. boroughs by prescription.

It is stated in the report of this case, that all the burgesses, whether resident or not, had a right to vote, which is manifestly contrary to the law; for as they were all to be admitted and sworn, at the *court-leet*, there can be no doubt but that they ought all to be *resiants*. The object and effect of their being assumed to be otherwise, is sufficiently apparent, for within twelve months before the election, which was then in question, 4000 *persons** *had been admitted as burgesses*, in the small borough of Cardigan, in consequence of which, during the poll, a scarcity of provisions was apprehended from the large concourse of people; and at the election the mayor said, he would admit every person to poll, who would say he was a burgess of one of the four boroughs, and had polled at a former election.

On the other side it was contended, they ought to have their admission on stamps.

DERBY.

1775. In the case of *Derby* it was said,† that there had been no previous determination of the right of election, upon which the parties *agreed* amongst themselves as to the right; and as usual, in such cases, adopted a usurpation.

It was argued that every member of the corporation had a right to vote. It was truly asserted that it was a borough

* The unlimited right of corporations to admit freemen at their pleasure, and to reject whom they will; to admit non-residents, and exclude whom they please of the inhabitants, has been so long prevalent, and the notion of its being legal, has so long existed, that it appears almost an insurmountable difficulty, to induce any mind to entertain the question; still more to abandon the error; but Lord Coke's analogy may be properly applied to this subject:—"As gold and silver may, as current money, pass even with the proper artificer, though it hath too much alloy, until he hath tried it with the touch-stone, even so this assumed right may pass with the *learned* as justifiable, in respect of the outside, by vulgar allowance, until he advisedly looketh into the roots of it, and tries it by the rules of law;" and Lord Coke candidly adds, as to the Court of Requests, of which he was speaking, "to say the truth, I myself did; but, *errores ad sua principia referre, est refellere.*"—4 Inst. 97.

† 3 Dougl. 289. See before, pp. 410, 467, 674, 883, 1181, 1522.

by prescription. For it has already been seen,* that it is George III. mentioned as a borough in Domesday. It was alleged to be Domesday. a corporation by prescription, which was not correct; for it was not incorporated before the reign of Philip and Mary.

It also afterwards received charters from King James I. in 1611. the ninth, and Charles I. in the 14th year of their reigns. 1638.

It returned burgesses to Parliament from the 26th of Edward I.: and therefore the original burgesses could not have been, as argued by the parties, the members of the corporation.

In the second of Edward III., the members were returned by the "burgesses;" and in the 12th of Henry IV. by cer- Common-tain persons named, and many others of the "commonalty." alty.

In the reign of Charles II., all their prior charters, and all their liberties and privileges were *surrendered* into the hands Surrender. of the crown, and a new charter was granted in the 34th year of that reign, incorporating the mayor and burgesses and nominating a mayor, nine aldermen, and 14 brothers (confratres), 14 capital burgesses, a common clerk, and an indefinite number of burgesses.

The mayor is chosen annually upon Michaelmas day, from among the aldermen, by a majority of the voices of the aldermen and brethren. The aldermen, brethren, and capital burgesses hold their offices for life, unless removed for ill behaviour, or *non-residence*. Vacancies are filled up by the Non-resi-choice of one of the brethren, by the majority of the mayor dence. and remaining aldermen. The vacancies among the brethren are supplied from among the capital burgesses, by the election of the majority of the mayor and aldermen, and remaining brothers; and a vacancy of the capital burgesses from among the burgesses, *inhabitants* of the borough, by the Inhabitants election of the majority of the mayor, aldermen, brothers, and remaining capital burgesses. The aldermen, brethren, and capital burgesses, must be constantly *resident* and *dwelling* Resident. in the borough.

The particulars of the municipal officers and elections of this borough, have been given with more detail than usual,

* See before, p. 263.

George III. from the circumstance of the original constitution of it
 1775. not having been disfigured by any decisions respecting it.

Residence. And it will not fail to be observed, that it is probably to be attributed to the same cause, that the *residence* of the municipal officers continued to be required without question or doubt.

The point most discussed in the progress of the case
Freemen. was, as to the legal mode of admitting *freemen* or *burgesses*, which were assumed in Derby to be synonymous; and, to a certain extent, properly so; because, by the original law, every burgess must have been a freeman, that is of free condition; but not *à converso*.—So that every freeman was not a burgess; for he was not so unless, as in the Cardigan
Burgess. case, he was *presented* by the jury as fit to be a burgess, and was therefore *sworn* and *enrolled*.

Some persons were said to be entitled to be admitted, and had demanded their admission, but were refused; and these were claimed to be added to the poll; and some *honorary burgesses*, admitted within the year, were objected to; as well as some who had been admitted upon the title of servitude.

The principal point of usurpation was according to the common practice *admitted*, for it was agreed upon both sides, that the corporation was in possession of the power of
Making freemen. bestowing the freedom, either by purchase or favour, upon persons who had no antecedent titles, and who were called “honorary freemen.”

Informations in the nature of quo warranto were, between the election and the trial of the petition, applied for in the Court of King’s Bench. But strange to say, the opportunity of trying the question was refused, and the petitioners did not therefore discuss the question before the committee.

The rights by birth and apprenticeship were insisted upon, and a clause of the charter of Charles I. was cited, for the purpose of showing by whom the officers and burgesses ought to be sworn. And in the course of the argument it was urged, that the intention of the charter in
Oaths. imposing the oaths was, “that those who were admitted “should first prove themselves to be loyal subjects, and

“proper and fit persons to be received into the freedom of the borough.” And it was justly contended, that the charters not specifying the mode of admission, it must be discovered by the general law, or the usage; as to which they said, that the *usage* had been to admit the freemen at the common hall, which was a meeting consisting of not less than twenty members of the common council, of which the mayor was to be one.

George III.

1775.

Usage.

But it is obvious that there is no authority given by the charter for a body exercising this power; and without such authority, it is submitted they could not be entitled to do it. It seems clear that this usage had been founded upon a substitution for the jury at the court leet.

The committee held, that the charter was not sufficiently conclusive to exclude other members from participating in the right of admitting freemen.

A bye-law of 1743, given in evidence, expressly spoke of the “freedoms” or “burgess-ships” as synonymous; and also of the rights having been investigated at the common hall by a “committee” of the corporation—which term of itself seems almost sufficient to justify the assumption that it was a modern innovation.

1743.

It further appeared, that in consequence of a variety of constructions being put upon the charter, *different usages* had prevailed at different periods in the borough.

It was stated that there was no fixed time for holding common halls for the admission of freemen, but the mayor was to call them at his discretion, giving three days’ notice—a course very likely to lead to abuse, and, as might be expected, *agreed* to by the parties.

It should be remarked, how much the regular holding of the *court leet*, at fixed periods of the year, of which all the *inhabitants* of the place would have notice, is to be preferred to this irregular and uncertain method of assembling.

Leet.

It was argued in the case—according to the known legal principles—“that ignorance of the law does not excuse the departing from it; and that every man should be considered as acquainted with the law.” It is clearly, therefore,

George III. the bounden duty of the Legislature to take care, for the sake
 1775. of the public, that the law is so plain, that it should be understood by the people; and therefore all these intricacies which have been introduced by abuse and usurpation, should be abated, and a more simple system adopted for borough and municipal government; and, as Lord Mansfield justly observed, "in all questions concerning the rights of boroughs, it is most desirable and necessary that the law should be certain; not only in respect of the matter, but also in respect of the form and manner of all their proceedings."*

Lord
Mansfield.

CRICKLADE.

1776. No determination had been made as to the burgesses of *Cricklade*. But there had been a succession of agreements as to the right of election, the substance of which was repeated again in this year.†

The question arose as to the boundaries of the borough. Another statement was also properly made, that it was not
 Houses. necessary that the houses for which votes were claimed, should either be ancient houses, or built upon ancient sites: notwithstanding what was decided in the case of Petersfield, Chippenham, Steyning, Tewkesbury, &c.; and the requisite of *residence* for 40 days was insisted upon.

These positions were controverted upon the other side. An objection was also raised to some votes, that they were split. It was stated, that *Cricklade* was a borough by prescription; which is correct; as its burgesses are mentioned
 Domesday. in *Domesday*.‡ It was also properly admitted, that it was not incorporated. The bailiff was the presiding officer, and he and the constables were chosen annually, by the *jury*, at the Michaelmas *court leet*, before the *steward* of the manor. The *watch* and *ward* of the borough was mentioned in the course of the evidence: and the *court leet* repeatedly, as being then in practice. It was stated to be the custom of the borough, that every inhabitant took it in his *turn* to make a list of the inhabitants within the borough.

* Cowp. 505, in *Simmons v. Ryan*.

† 4 Doug. 1.

‡ See before, p. 157.

The committee came to a resolution, which seems to George III. 1776. involve a strange description of the burgesses of Cricklade. The right was declared to be in "the *inhabitants* possessing "*houses* within the borough, who were freeholders, copy-holders, or leaseholders, for any term not less than three years, or for any such term or greater, determinable upon lives; such freeholders, copyholder, or leaseholder, having "been in the occupation of the house 40 *days*."

The following further resolutions of committees in this reign, may be stated, as showing the singular descriptions, which were given of burgesses in the different boroughs, although they had probably all the same origin.

In *Camelford*, the right was declared to be "in the *freemen* Camelford. 1796. "being *inhabitants*, and paying *scot* and *lot*.* The capital burgesses having no right to vote, unless they were free burgesses, inhabitants paying *scot* and *lot*." The latter was no doubt a correct decision, because, although the names of dignity of the superior officers of the corporation, are often mentioned in the determinations as to the right, yet it should always be remembered, that they did not vote in those characters, but were all to be considered as exercising their rights under the general title of *burgesses*.

The right in *Great Grimsby*,† was decided to be "in the *freemen* Grimsby. 1793. admitted at a *full court*, by the mayor, aldermen, common councilmen, and burgesses; such freemen being "*resident*, and paying *scot* and *lot*, in all cases—except no "rate has taken place subsequent to their admission."

In *Malmesbury*,‡ the right was declared to be "in the *freemen* Malmesbury. 1797. aldermen, and 12 capital burgesses, only." A surprising decision—considering that Malmesbury had been a borough from so very remote a period, and had *burgesses*, and returned members to Parliament, so long before any such select body could have existed.

The right in *Newcastle-under-Lyne*,§ was declared to be "in the *freemen* Newcastle. 1792. residing in the borough."

* 4 Doug. 478.

‡ 4 Doug. 491.

† 4 Doug. 487.

§ 4 Doug. 496.

George III.

In *Steyning*,* the right of election was determined to be "in the inhabitants of ancient houses, and houses built on the sites of ancient houses, within the borough of Steyning, being householders paying *scot* and *lot*." But in the next year, it was simply decided, that the right was in the "con-
stable and *householders*, *inhabitants* within the borough, paying *scot* and *lot*;" a variety as to the description of the burgesses of this borough which could not have occurred if the ancient system had been pursued.

Tewkes-
bury.
1791.

In *Tewkesbury*,† the right was declared to be "in the *free-men* at large; and in all persons seized of an estate of freehold, in an entire dwelling-house within the ancient limits of the borough."

Warwick.
1793.

As to *Warwick*,‡ the right was determined to be "in such persons only as paid *church* and *poor* in the borough, whether inhabitants or not."

Westmin-
ster.
1795.

In *Westminster*,§ the right was determined to be in the *inhabitant housekeepers* paying *scot* and *lot*. Which was repeated in 1795.

LYME.

1780. As to *Lyme*,|| a question arose as to the right of election: the *petitioners* insisting, that the freeholders, and freemen, resident in the borough, and they only, had a right to vote—the *sitting members* contending, that the right was in the freemen only, whether resident or not.

Petition.

One of the *petitions* stated, that one Davis, Coade, and others, had conspired together, since the year 1778, to prevent a legal election of mayor, with a view to acquire an undue influence at the then approaching election. That they procured Coade to be illegally placed in the office, on the 4th day of October, 1779. That an information, in the nature of a *quo warranto*, was filed against him, and that he fled from the process. That the majority of the capital burgesses, being denied their right of voting for mayor, on the 30th of August, the usual day for the election, assem-

* 4 Doug. 509.

§ 4 Doug. 516.

† 4 Doug. 512.

|| See Phillips' Election Cases, 327.

‡ 4 Doug. 514.

bled themselves on the following day, according to the statute of the 11th of George I., and then duly elected one William Paterson into that office ; who, on the day of election, took the poll. That he declared the petitioners to have the majority ; and, accordingly, returned them. That Coade had also taken a poll ; and having admitted a large number of unqualified persons to vote, declared Mr. Hardford and Mr. Dowell duly elected : they, therefore, prayed relief, &c. George III.
1780.

For the *petitioner*, it was said, that Lyme was the ancient demesne of the crown : which is not correct, for it is not mentioned in Domesday. But it was truly stated, that it was represented in Parliament before it was incorporated : for it returned members to Parliament from the reign of Edward I. ; and was not incorporated previous to the reign of Queen Mary—from which fact it was said, the inference was strong, that the members were originally returned by the freeholders or tenants of the crown. Petitioner.

It was made a free borough in the 12th of Edward I.,* and the bailiffs are stated in the return for Dorchester in that reign, to have the return of writs. Another charter was granted in the fifth of Edward III. to the men of Lyme. And a charter of *inspeximus* in the first of Richard II., stated a petition of the *inhabitants*, complaining that the town had been much injured by the sea, the jury having found (in all probability the jury of the court leet of the borough) that in consequence of that fact they were unable to pay their fee-farm, and the tenth. And in the reign of Henry IV., on account of their poverty, they were released from all arrears of their fee-farm. In the reign of Henry V., the town was granted to Thomas Cook and his wife. In the reign of Henry VII., we have seen the *burgages* mentioned. In the reign of Henry VIII., on the petition of the *burgesses* and *inhabitants* the town was granted to the *burgesses*, provided the *burgesses* and *inhabitants* should repair the cob. Queen Mary also, in the 11th year of her reign, granted a charter to Lyme.† 1283.
Hen. IV.
Hen. V.
Hen. VII.
Hen. VIII.

Queen Elizabeth also granted a charter to that borough ; Elizabeth.

* See before, p. 529.

† See before, pp. 794, 823, 1061, 1137, 1200.

George III. which, like many charters to other places, did not accurately
 1780. state the facts connected with the borough; it asserted, contrary to direct proof, that it was an ancient demesne of the crown: and that assertion appears to have given birth to much of the subsequent error and discussion.

The return to Parliament in the ninth of Queen Elizabeth, was by the mayor, *burgesses*, and *inhabitants* of the town.

In the fifth year, entries commence respecting the court
 Leet. *leet*: and *presentments* are made in the usual form, which are continued for many years.

In the 22nd year of the same reign, the first entry occurs in the court of hustings book, of the election of a mayor, recorder, and coroner, by three classes of persons: first, those who are of the council;—secondly, by certain *free burgesses* who are not of the council;—thirdly, by certain *freemen*, who are neither burgesses nor of the council.

It is necessary to explain that portion of this entry which speaks of the *freemen* who are *not burgesses*. The former documents have shown that the *inhabitants* were the *burgesses*; and therefore, if there were in the borough any persons of free condition, that is to say, "*liberi homines*" they would be entitled to be burgesses.

From other entries in the same reign, it appears that considerable confusion had been introduced into the records of the borough, by confounding questions of *tenure*, with question of *burgess-ship*; and the *court leet*, with the *court baron*. The possession of a freehold was particularly mentioned, in an ancient paper amongst the records of the corporation, as entitling a person to be *sworn* as a *free burgess*. Which was no doubt strictly accurate, provided the person was in possession of a freehold house; and therefore,
 House-
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From the same document it appears, that those who had not freeholds, but who *wished to be free*,* were made so upon paying the fine and taking the oath, and they were called freemen. So that in fact, the names before given of *burgesses* and *freemen* are explained, and in effect are alike,

* See before, Cinque Port Charters.

although the qualifications upon which they had been recognized as freemen were different. The identity of both these classes appears to be established by the returns of this period. That in the 28th of Elizabeth, is by the mayor and *burgesses*. In the 30th of Elizabeth, by the mayor, and *burgesses*, and the *inhabitants*, and *commonalty*. There are many similar changes in subsequent returns; and as it is not possible that the elections could have been made by different classes of persons, it may fairly be inferred, that these returns describe the same body of individuals.

George III.
1780.
Returns.

In the first year of James I., there was a charter of incorporation. And in the seventh year of that reign, there is an entry in the hustings book of the election, which states that the mayor, with the greater part of the *freemen* and the *burgesses* who had voices in the election, had elected Mr. Jefferies.

James I.

In the 10th year of Charles I., a charter of incorporation was also granted by that king; and it appears that at that time the wages of the members were paid by the *inhabitants*.*

Charles I.

The entry of the determination of the mayor and burgesses respecting the persons who were to contribute to the wages of the member of Parliament, is in the following words:—"This day, at a court holden in the moot-hall, it is agreed by the mayor and burgesses of Lyme Regis, that the *burgesses* and *freemen* of the town, as well *inhabitants* as not inhabitants, and all other *inhabitants*, shall contribute to the payment of taxes and impositions to be levied towards the charges of the burgess of the Parliament." It is signed by the mayor and six capital burgesses, and 14 other persons, and dated 1684.

This bye-law appears, upon the face of it, to be illegal and void; for the mayor and burgesses would have no power of imposing this charge upon those who did *not* inhabit in the borough, within which their jurisdiction is limited.

The returns purported to be made by the *burgesses*. In that same reign, it appears from the entries in the freemen's book, that *non-residents* were first introduced: Sir John

Non-resi-
dents.

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Non-resi-
dents.

* See before, p. 1672.

George III. Jeffries, Sir Robert and Sir Richard Strode, who appear to
1780. have been members for the borough, were made free.

But as a proof that *non-residents* were not, at that time generally admitted, the order book of 1631 shows, that *some persons having left the town, were ordered to come and reside in it*, or else to be dismissed from the corporation. And in an entry of 1637, three capital burgesses having *removed from the town*, are stated to have resigned their offices, which had been accepted by the corporation: and they were discharged and dismissed.

Charles II. In the 36th of Charles II., that king granted a charter for giving the power chiefly to the common council, consisting of the mayor, 15 burgesses, with the recorder. But the election of members to Parliament, was granted to the mayor, capital burgesses, and *freemen*, or the greater part of them, as theretofore, in ancient times had been used and accustomed.

James II. The proclamation, however, of James II. put an end to this charter; and all the old magistrates and burgesses were restored.

1686. Upon a petition in the first year of James II., it was proposed on behalf of the petitioners, to prove that *residence* was necessary in order to give the *right of voting*.

Several records of the corporation were produced, and particular entries of names and facts were read.

The most material proofs or inferences of *residence* were made out in the following manner, viz. :

The names of the voters who signed several returns, were read; and lists were produced of *resiant freemen* of nearly the same dates. In many instances they corresponded; the same names being found in both lists.

Several others who signed the returns, were also found in other lists of the commoners; and many among the *jurors of the leet*: some at the *hustings court*. And from the whole it appeared, that *freeholders and freemen resident* in the borough had elected the *members to Parliament*.*

1689. In 1689, upon another petition, it was insisted, for the

* Phil. 341.

petitioner,* that the right of election was in the mayor, ^{George III.} ~~burgesses, and freemen at large~~; and it was contended, contrary to the fact, that the charter of Edward IV., had made it a corporation; so that the borough and corporation were coeval. Five foreign freemen had voted for the petitioner; and in the course of the evidence as shown before, *non-residents had been introduced after the act for the regulation of corporations*; and the right of the freeholders was attempted to be established, but it appeared that they had been before rejected. However, the same question was again agitated in the reign of Queen Anne, a petition having been presented stating the right to be in the mayor, capital burgesses, *freemen*, and *freeholders, inhabiting* within the borough; and that a few days before the election, the mayor said he would admit the *freeholders* to vote; but finding several come to vote for the petitioner, he refused them, and declared the other candidate elected. 1689. 1701.

The return of that date purports to be made by the mayor, capital burgesses, and ~~freemen, being all~~ inhabitants of the same borough: but the words "being all" are interlined. 1702.

Another petition was also presented a few years afterwards, of several capital burgesses, *freemen* and *freeholders inhabiting* within this borough, on behalf of themselves and others, stating their right to vote, but that they had been rejected. 1708.

The return was also on this, and many subsequent occasions, by the mayor, capital burgesses, and *freemen, inhabitants* of the borough.

Such is the history of Lyme, to the period when the inquiry we are quoting occurred, upon which the committee reported, that all the four were not duly returned, and the election was void. 1780. Election void.

A new writ issued for another election, after which a petition of Mr. Harford and Mr. Daniell, and another of voters in their interest, were presented.

On the hearing of the case, the *petitioners* again insisted, that the right of election was in the *freeholders* and *freemen resident* in the borough, and them alone. ^{Petitioners.}

* See before, p. 1874.

George III.

1780.
Sitting
members.

The *sitting members* contended, that the right of election was in *freemen only, whether they were resident or not.*

For the petitioner, amongst other things it was stated, that the mayor and burgesses, from time immemorial, had held a *court of hustings* at the guildhall every Monday, where they hold pleas of land, &c., and *admitted persons to the freedom* of the borough.

Leet.

That the *court leet* was held by the *steward* twice every year, on the Monday after Michaelmas, and on a day soon after Easter.

1580.

That the mayor, since the year 1580, was chosen on the Monday after the feast of St. Bartholomew: the mayor and burgesses meeting at the guildhall, and recommending two burgesses, who were of the council; one of whom was elected mayor by the *common burgesses*; and sworn in by the *steward at the leet*, on the Monday after Michaelmas.

Other documents and entries from the records of the borough were produced, to prove that *freeholders* formerly voted for members of Parliament, and that it was necessary that *the electors should reside in the town.*

In the summing up of the evidence for the petitioners, Brady was quoted. Representation in Parliament was assumed to be founded upon territorial right. And though it was properly urged as a striking feature of the ancient constitution of the place, that the mayor was still sworn at the *court leet*; yet it was assumed throughout the argument, that the burgesses were of a *corporate* character; and, strange to say, it was contended, that "*liberi homines*" were *comparatively words of modern date.*

Sitting
members.

The counsel for the sitting members justly disputed the authority of Brady; and relied upon Lyme being a corporation, and upon the long *usage* for the non-residents.

The evidence which was adduced, was also founded upon the assumption, that the term "burgess" was a corporate term; and it was a striking circumstance of the inquiry, that they gave in evidence, in proof of the right of the non-residents, the entries which required the burgesses to return and reside in the town, under the peril of disfranchisement.

The committee decided against the right of the fresholders, ^{George III.} and held that *residence was not necessary*.

Right.
1783.

In the 23rd of George III., another petition occurred,* which alleged, that none but *residents* ought to have been admitted to vote. And the petitioners insisted first, that none but *inhabitants* could vote; and secondly, that *freeholders*, subject to that limitation, had the right as well as the freemen.

Many returns were read, which however it is unnecessary to state, as they were in substance the same as those mentioned before.

In the course of the evidence, reference was made to the *court leet* and the *juries*; and also to the *presentments* of the *resiants*, and the *swearing* of the *decenners* to their fealty: The *oath* made by a *burgess* was given in evidence, which bound him to be contributory to all manner of taxes, charges rates, and impositions within the town; and that he should colour no foreigner's goods, nor know any foreigner to buy or sell within the town. And it was said, that the *oath* of an *honorary burgess* differed from this. If it did so, there could hardly be stronger evidence of their usurpation: because it is certain that there could be no authority but to administer one oath to all the burgesses; and if the honorary freemen stood in such a position that it was necessary to make a new oath for them, there can be no doubt that their title was not sanctioned by law.

An ancient *resiant roll* was read, which was intituled, "Nomina omnium *inhabitantium villæ ibidem tam burgen-sium et liberorum hominum quam aliorum ejusdem villæ.*" ^{Resiant roll.} And other *resiant rolls* at different periods were also given in evidence; and in one instance, in an entry in the corporation book, there were two lists of 24 names, each distinguished by a circumflex, which seem to have been the two juries.

There appeared to be no books prior to 1569; and after 1569. 1714, the term "*freemen*" seems to have been adopted, in-

* 2 Luders, 3.

George III. 1783. *stead of the more proper appellation of "burgesses;" and that the freemen were not the same as the burgesses is proved by women being admitted as the former, who could not be the latter.*

The usual consequences followed, upon the freeholders being supposed to have a right of voting: Mr. Henly having made several freeholds for election purposes.

The strange argument, that the word "burgess" had many different meanings; was asserted upon this occasion, as, the inhabitant of a borough—a burgage tenant—a borough freeholder—a corporator—or a member of Parliament. And it was added, that its particular application was to be discovered by the constitution of the place. A stronger mode can hardly be adopted of showing the futility of these distinctions than the enumeration of the terms, which is sufficient to prove that they are all resolvable into the same common point. An inhabitant of a borough was not a burgess unless he was a householder. A burgage tenant was a burgess, because, if according to the primitive import of the word, he occupied the house, he was also a householder. A borough freeholder was not a burgess, unless he was an inhabitant, and occupied a house in the borough; and if he did, he was not less a burgess because he had a freehold interest in his house. A corporator was an inhabitant householder, and therefore a burgess, having also the superinduced additional qualification of being a member of a body corporate. A member of Parliament is only another name for a burgess, according to the duty he had to perform; because, by the statutes and the writs, the members were to be burgesses of the borough.

Leet. *It should not be overlooked in this case, that, notwithstanding the earliest admissions were at the court leet, yet the rights by birth and servitude were, in this borough, attributed to the corporate rights; instead of being deduced, as they ought to have been, from the common law.*

Birth. Servitude. *But the custom to this effect, which was insisted upon with reference to the borough of Lyme, was, after trial, negatived, and the questions of non-residence and disfranchisement, upon*

Non-resi-
dence.

that account, were put in a course of judicial investigation ; ^{George III.} but were not brought to trial in consequence of their being ^{1783.} stopped by technical objections.*

The counsel for the sitting members relied, as usual, upon the *usage*. But it should be remembered, that on subjects of this description, where the right is to be exercised but at intervals, often passing without contest, it is the height of error to rely upon the usage, unless the accompanying circumstances, or the nature of the usage, give it the additional support of reason and expedience. But it is monstrous to adopt a usage in such cases, where there is so strong a disposition to usurp—so little inclination or power to resist, and the usage in itself oftentimes so unreasonable and anomalous. But there are not wanting instances in which usage has been disregarded. In the constitutional proceedings of the committee† in the reign of James I., a usage for 69 years was disregarded ; and a user for 300 years was not allowed to be considered as an objection. ^{Sitting members. Usage. Chippenham.}

In the case of the King and Bird,‡ a usage of nearly 205 years was described by Lord Ellenborough as too recent to admit of being used as an argument in a court of justice.§

The unfounded supposition that the charter of Edward I. incorporated Lyme, was much relied upon—upon this occasion ; as well as upon a quo warranto in 1784 :—and the doctrine of Brady was quoted at length and insisted upon.

The committee determined, that the right of election was ^{Right.} “in the freemen only, as well resident as non-resident.” So that the municipal and parliamentary rights given by the charters and law to the burgesses of Lyme, were to be enjoyed by any persons scattered over the kingdom, or even the world. For when once the local limits of the borough are passed, no other restraint can be placed upon residence.

* Doug. 79, 132, 144, 168.

† Vide ante, p. 1190.

‡ 13 East, 367.

§ See also Morgan v. Palmer, 2 B. & C. 729 ; Rex v. Headley, 7 B. & C. 496, post. ; and King v. Solway, 2 B. & C. 424.

George III.

SALTASH.

1785. The question, who were the *burgesses* of Saltash?—was discussed before a committee of the House of Commons, in 1785.*

Like the other boroughs of Cornwall, it is not a borough by prescription. It is not mentioned in Domesday. But in John. the reign of King John, it received a charter from Reginald de Valle Torta, who was lord of the honour and castle of Trematon, and as such, lord also of Saltash. He granted to the burgesses of Essa, (the then name of Saltash,) and their *heirs*, a charter, fixing the rent of their *burgages*, and granting that they should not be impleaded, except in the hundred of the town, and that they should be bound to attend the hundred court only three times in the year.

The provost, or portreeve, is mentioned in the charter, who is to be elected by the burgesses. It also fixes the ameracements the burgesses are to pay. And grants that their *heirs* shall have their goods and lands, fixing the relief which was to be paid. It gives them also pasture—limiting a sum to be paid for every head of cattle; and directs that no ship should pass the Rock of Essa, to make any merchandise by buying or selling—with a grant of a fair, &c.

1381. Richard II., in the third year of his reign, confirmed the charter of Reginald de Valle Torta, to the *burgesses*, their heirs, and successors.

1552. In the 26th of Edward VI., Saltash first sent members to Parliament, by the mayor and *commonalty*; and in the first of Queen Mary, by the mayor and *burgesses*. And Queen

1584. Elizabeth, in the 27th year of her reign,† reciting the charters of Reginald de Valle Torta—and confirmations by Richard II., Edward IV., and Henry VIII.—establishing that the privileges of the burgesses continued the same to that time—confirmed all their former privileges, stating that they had enjoyed them by *prescription*;‡ and at the petition of the burgesses, incorporated them—making Saltash a free borough,

* 2 Luders, 107.

† See Carpenter's Saltash Case, 1808, p. 19, et seq.

‡ It was probably from this statement in the charter of Elizabeth, that the parties agreed in a case at law, that Saltash was a borough by prescription.—5 Bur. 2681.

by the name of the "mayor and *free burgesses* of Saltash." George III.
1785.
There were to be 10 aldermen, one of whom was to be annually chosen mayor, by the mayor, aldermen, and free burgesses; and the charter further granted, that there should be two burgesses to Parliament, to be elected by the *mayor* and *free burgesses*.

Little information is to be obtained respecting the early history of Saltash, as all its documents, down to the year 1742, appear to have been lost or destroyed, in a manner not to be accounted for—but supposed to have been in consequence of the modern dissensions in the borough.

Nothing can establish more clearly the desire there was in the different boroughs, to involve their early history in doubt and mystery, and by those means give an opportunity for the establishment of their modern usurpations, than the pains which were taken—of which we have seen many instances,*—to destroy, mutilate, or alter their ancient documents.

There was one exception in the destruction of the records of Saltash. A constitution book, of the time of Queen Elizabeth, was given in evidence on this occasion, many leaves of which had been cut or torn out; in order to conceal which, it had been regularly paged—which, however, it was obvious, had been done subsequent to the mutilation.†

The book was found in the house of a person who had formerly been town-clerk of Saltash, but was at the time residing abroad.

It contained ordinances made at the *law court*, or *court* Court leet. *leet*, in the time of Queen Elizabeth, before the mayor and deputy steward, as well as the different *oaths* of the *juries*, who were to be sworn to choose the mayor; who is described in the oath, to be "such a one as is fit to have the government and conservation of the borough." Other oaths of the officers of the borough, and of fealty, as well as the oath of the jury, are given.

One of the constitutions read in evidence, ordained that

Constitutions.

* See East Looe, West Looe, Colchester, Poole, Portsmouth, Winchester, &c.

† See Carpenter's Saltash Case, pp. 31, 32.

George III. "all *foreign burgesses* should be contributory to all the

1785. "reasonable charges for the maintenance of the liberties and franchises of the town, as should be taxed by the mayor and his brethren, or else to be disfranchised." And "that every such freeholder should enter his fine for his suit to the courts, or else pay the common amercements." Also it was enacted, that "no person should enjoy the liberties of the town, except he had lands or tenements within the town, in fee to him and his heirs for ever. And that he should bear yearly of high rent to the town, 3*d.* at the least; and also to pay unto the town all such customs, suits, and services, as to the same appertained; and to pay for the new making of the passage boat, as of old time had been accustomed, or else not to be passage free, and to pay for a relief, 2*s.* 6*d.*, whether it be a whole *burgage*, or half a *burgage*; and to serve at the three *law courts* there by the year. And to do his fealty at the next court, after he is found tenant, and to pay his fealty 8*d.*, whereof to the steward 4*d.*, and the common box, 4*d.*" And this ordinance also declared, that no *free burgess or inhabitant* within the town, should implead any other *free burgess or inhabitant* in any other court.

A survey of the borough in 1650, under the Commonwealth commission, was also given in evidence, which specified the high rents or rents of assise of the borough, speaking of the *burgages* and half-*burgages*, and the inheritance of them by the heirs. The total number of the *burgages* being 105, making together the sum of 3*l.* in high rents.

1675. In the 27th year of Charles II., one of the aldermen in open court, declared that he had aliened his land unto his son, and thereupon desired to be dismissed of his aldermanship, which was consented to by the mayor and aldermen then present, and he was discharged accordingly.

Another alderman desired to be dismissed of his aldermanship, which was consented to by the mayor, for that the land by which he was made burgess, was only a trust.

In the next year, one entered his deed, and was sworn a free burgess—and numerous similar entries were to be

found in the book to the year 1723; but on one occasion, in George III. 1714, a person was *sworn* and *admitted a free burgess*, with- 1785. out any reference to his lands, deeds, or fealty.

It appears that the charter of Queen Elizabeth was, in the Surrender. 34th of Charles II., surrendered to the king by the hands 1682. of the Earl of Bath. The king thereupon granted another, dated in the next year, which altered the constitution of the borough, as has been seen in other places; particularly giving the mayor and aldermen the power of *electing* as many *free burgesses* as they thought fit. But the proclamation of James II. was said in this case, as in others, to have restored the previous charters; and that of Charles II. was stated by the petitioner never to have been accepted, nor acted upon. The petitioners gave in evidence, entries subsequent to the charter, to show, that those members of the corporation who were appointed under it, had possessed freeholds in the borough before the granting of it.

The returns to Parliament, till 1714, were by the mayor and *burgesses*, but in that year, and 1718, the return concluded, that the mayor and *free burgesses* had placed their common seal—and also the free tenants by tenure of the borough, had placed their separate seals.

In the course of the inquiry it appeared, that the usual consequences of a freehold right of voting were produced; and faggots, or persons with sham votes, who had only Faggots. colourable *titles*, or *other persons'* deeds to vote upon, had voted in the election in 1723, which was called the Duke of Wharton's election.

Parol evidence was given in support of the right of the freeholders; in the course of which it appeared, that *old ruins where a house had stood*, were stated to give a *right to vote*, as well as a house.

And a strange distinction appears to have been taken, as if there were two classes of burgesses. The witnesses calling the freeholders *free burgesses*, and the members of the corporation, *sworn free burgesses*; notwithstanding the evidence established that all of them were sworn:—and in other respects the parol testimony exhibits the confusion and

George III. intricacy which was introduced by these assumed different
1785. rights.

On the behalf of the sitting member, besides several returns, the surrender of the charters—the charter of Charles II.—and the proclamation of James II.—the modern charter of the 14th of George III., granted after the dissolution in the preceding year, and the poll of 1772, were given in evidence, as well as facts to show that the charter of Charles II. had been acted upon.

The question on this occasion was, whether the *burgesses* who were to vote, were the members of the *corporation*, or the *freeholders* of ancient houses or their sites, within the borough, held by burgage tenure.

Petitioners. The petitioners insisted upon the latter—the sitting
Sitting members supported the former—and if the freeholders had
member. the right, it was agreed the petitioners were entitled to the seat.

There had been no previous decision with respect to the right of election. But there had been two unsuccessful
1780. petitions in 1780 and 1783.
1783.

The committee decided, that the sitting members were duly elected, and thus affirmed the right of the members of the corporation, and negatived that of the freeholders.

In the latter they were no doubt correct:—although it must be admitted, that the charter of Reginald de Valle Torta, and the entries in the ordinance book of the date of Queen Elizabeth (if it be taken to be genuine) go further to establish a freehold right than the documents of any other borough; yet, strong as this evidence may be, it cannot be considered as sufficient to establish that the freeholders were the burgesses, and that burgess-ship depended upon tenure, contrary to the effect of all the general documents which relate to the kingdom at large.

There is no ground for supposing that Saltash should have had a peculiar constitution, differing from other boroughs; and the inference to be drawn from Domesday Book—from the general early law—as well as the nature of boroughs, and their jurisdiction, all tend to show that they were *not*

founded upon tenure, but were connected with the local administration of the law, with respect to the *inhabitants* of the place, who by the general common law, were bound to do *suit*, and be *sworn* at the *court leet*. And it is obvious that the difficulty which was created at Saltash, arose from the confusion of the court leet with the court baron. And there seems also to have been another court held at the guildhall, before the mayor and aldermen, which was called the convention court. The entries were clearly those of a *court leet*, with its *jury*: and the *oaths* were to be administered with reference to the municipal officers, who were engaged in the government of the borough:—but still the freeholders, their fealty, and reliefs, were all introduced into the argument, though they relate to the functions of the court baron.

George III.
1785.

Court leet.

The charter of Charles II., gives the power of making *burgesses* to the mayor and aldermen, and declares that none but those so made should be the *burgesses*, which would tend to introduce further confusion into the borough, if that charter could be relied upon as an authority. But probably the more correct view of that document would be, to consider it as void; and that the corporators under it could not be the *burgesses*.

Burgesses.

Upon the whole, therefore, notwithstanding the documents which have been quoted with respect to Saltash—and the charter of Charles II.—it would seem that the real *burgesses* of that place, would be, as in other boroughs, the *suitors* at the *court leet*, or the *inhabitant householders paying scot and lot*.

In the next year, another writ was issued for Saltash, which was followed by another petition, upon the same question as to the *burgage tenants*.

1786.

The evidence was nearly the same as on the former occasion, but the committee decided, that the petitioner was duly elected.

Saltash was once more before a committee of the House in 1808; when the petitioner contended, that the right was “*in the mayor and free burgesses, being members of the corporation.*”

1808.

George III.

1805.

The sitting member, on the contrary, stated the right to be in those persons seised of an estate for life, or some greater estate, in an entire ancient burgage tenement, situate within the borough, wherever an ancient dwelling-house now stands or formerly stood, and in no other persons.*

And the committee decided, in the first instance, that the right was in the former; but upon its being intimated to them that an ambiguity existed in the mode in which the right was stated, they then determined, "that the right was in the *" mayor and corporation only : "*" an extraordinary determination, considering that the borough was not incorporated until after it had returned members to Parliament.

CARLISLE.

1786.

In the year 1786, the question as to the *burgesses* of *Carlisle* came before Parliament,† and again in the following year. There had been no previous determination upon the subject. But in the year 1711, the right had been *agreed to be* " in the mayor, aldermen, bailiffs and freemen, resident or not " resident : " probably because it was the interest of both parties so to agree. Otherwise, as the mischiefs resulting from the arbitrary admission of freemen had been felt in the place, they would probably have abstained from such an agreement.

Upon the inquiry in 1711, 155 voters were objected to: 41 of whom had been admitted to their freedom *after the teste of the writ* : and 32 others very recently.

It will be seen, that this same evil was subsequently continued. And therefore it may be material to give a few facts connected with the history of this place.

It is not mentioned in Domesday, because the northern counties are not returned in that record. It received a charter in the reign of Henry III.; and sent members to Parliament from the earliest times. It has also been seen in the reign of Edward II., that the king committed the custody of the city to the citizens.‡

* See Carpenter's Report of this case.—*Lond.* 1808.

† See case as to Carlisle, Sir Thomas Raymond, 435, and Tremain's Entries, 524, 525, 1 Vent. 355.

‡ See before, p. 594.

Subsequent charters were granted to it, particularly one ^{George III.} in the 13th of Charles I., by which the government of the ^{1637.} town was given to one mayor, 11 other aldermen, two bailiffs, and 24 capital burgesses, forming the common council, and an indefinite number of freemen. The capital burgesses were elected by the aldermen out of the freemen ; but the charter contained nothing relative to the making of freemen.

There were also in the corporation eight trading companies or guilds : the merchants, tanners, skimmers and glovers, butchers, tailors, weavers, shoemakers, and smiths.

Persons *born* the sons of freemen, or having served a regular *apprenticeship* to a freeman, and having been admitted to the brotherhood of any of those guilds, were entitled to the freedom of the city.

The reader will not fail to perceive, in what an extraordinary manner, the rights of free condition under the common law, are mixed up with admission into the voluntary associations of the guilds ; which is the more extraordinary, as, according to the right, here defined, any *apprentices* serving in any other trade than the eight specified above, would not be entitled to their freedom ; and it has already been seen, that in London there were before this time a great many other trades not contained in these eight. The effect, therefore, was, to give to these eight guilds a monopoly, which, under any circumstances, must have been untenable.

The point in this case turned upon the freemen who had carried the election not being legally made, as alleged by the petitioner ; because they were elected by the common council, who had no power to make them ; that they had no previous qualification for admission to the brotherhood of one of the guilds ; and because they were fraudulently and occasionally made.

Parol evidence was given to disprove the right of the common council to make honorary freemen, or to confer the freedom upon any who were not members of the guild, acquiring the right by birth or servitude ; and to show that the *first attempt to make honorary freemen had only been*

George III. *about 60 or 70 years before*, and that they were called
 1786. "*mushroom freemen.*" A record of the corporation called
 the "Dormont Book," of the date of 1651, was given in
 evidence, subscribed by the mayor and council, with four
 of every occupation in the city, in the name of the whole
 citizens and inhabitants. The book in its title purported
Inhabitants to be the register of the commonwealth of the *inhabitants*.
 It chiefly related to preserving the money and property of
 the city; and there was in it an order respecting the making
 of the freemen, in the following form :

<i>Stet.</i> Mayr alone shall make no freemen of <i>outmen.</i> <u>of everie occupacin</u>	That the mayor of himself shall not hereafter make any fremen, without the advice of the moste parte of the counsale which is agreeable to the auncient custom and constitutione of the citie.	<i>outmen</i> <i>and foure</i>
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Originally it stood without the words in italics, which were added in the wide margins of the book, so as to become a part of the order, and of the marginal abstract. The hand writing of the additions appears to be very ancient; the word "*stet*" was prefixed to the greatest part of the orders in this book. Many of them had interlineations and alterations in a different hand.

This appears to be another instance in which an irregular mode is adopted for the purpose of giving the companies a share in the municipal government: and there is a subsequent order, empowering the mayor and council with four of the election of every occupation to displace certain officers. It appeared from the book that many entries had been made in it subsequent to the original writing, and incorporated among the ancient writing, in the wide margin of the book.

1602. The court leet is mentioned in 1602, the first year of the reign of James I.

1579. In 1579, a person was disfranchised for having *with-drawn* himself, but *coming again to reside* there, he was again admitted as a freeman, and to his former office.

In 1689, many freemen having been unduly elected, were ordered to be disfranchised. George III.
1689.

In 1713, it was ordered, that none should be made free who had not served their time to some one who had a right to take apprentices, or had a right to claim their freedom by birth. 1713.

In 1741, the order of 1713 being considered doubtful and uncertain, was ordered to be repealed. 1741.

In 1736, a person was admitted an *ex gratia* freeman; but in 1750, the making of *ex gratia honorary freemen* was complained of by the other freemen, as an encroachment upon their liberties, and very prejudicial to their rights; and an order was thereupon made that no person should be admitted a freeman unless he was entitled by birth or servitude; and steps were taken to prevent any other admissions. 1736.
1750.
Honorary
freemen.

In 1757, there appears to have been some disputes between the common council and the freemen, upon the subject of making *honorary freemen*, when a compromise took place involving the abandonment of that practice. 1757.

In 1758, another order was made expressly for the same purpose; but the proceedings were stated to have arisen out of some personal altercations in the city. And in 1759, an order recites, that the former directions had been found inconvenient, by excluding from the corporation persons of probity and distinction, who might be useful to it. And, therefore, the order was annulled, and the common councilmen were authorized to make freemen, as it was stated they had immemorially done—an observation which is obviously inaccurate. 1758.
1759.

These orders being all repealed, on the following day, 1196 persons were made free; and between the months of September, 1784, and February, 1785, no less than 1443 freemen were made—and between 1688 and 1784, the number admitted was 1520.

Quo warranto informations were obtained against three of the new freemen, upon which they all suffered judgment of ouster to pass against them, there being demurrers to the replication, which they declined to argue.

George III.

1758. The new freemen appeared to have been made from lists prepared for the purpose—one man having a list of about 500 persons, chiefly colliers.

Sitting
member.

In the evidence and documents produced upon the behalf of the *sitting member*, the inquests were spoken of: and any freeman *departing* the city, for a *year and a day*, was to lose his freedom. The mayor was prohibited from making freemen alone: and no freeman, being out of the city, was to take an apprentice.

It appeared that the guild books were only extant from 1608. The committee decided, that the petitioner was duly elected, and thereby properly *negated* the right of the *honorary freemen*.

- After this decision, a son of a freeman who had not been admitted into a guild, obtained a mandamus to be admitted. This was suspected to have been done by the concurrence of the common council. Application was therefore made to the court by other persons, to be admitted as parties, to prevent a collusive judgment upon the writ; and they were allowed to defend the prosecution upon the behalf of the guilds. The return to the mandamus brought the question of the previous guild right to issue, and the cause was tried by a special jury, before Lord Kenyon, in the sittings after Michaelmas term, 1789, when a verdict was given for the prosecution against the supposed right.

Guilds. Thus, also, was *the connexion of the guilds with the municipal constitution of the place properly annulled*.*

1784. About the same time, a quo warranto was filed against one who was made free in 1784, and who was also an alderman, calling upon him to show by what right he claimed to be a freeman. He pleaded charters, &c. in support of the right of the common council to make freemen. The prosecutor replied a denial of their right—the rejoinder took issue upon the replication, and the cause was ready for trial at the summer assizes of 1790, but the defendant withdrew his plea, and judgment of ouster was signed against him.

Thus, after a mature inquiry, two of the great abuses were

* See before, Introduction, xiv., and the London Statute, 1724.

stopped at Carlisle; and the previous assertions of their illegality thus confirmed. George III.
1786.

In 1791,* the right was determined to be in the *freemen* 1791.
duly admitted and sworn, having been previously admitted brethren of one of the eight guilds or occupations, and deriving their title to such freedom by being the sons of freemen, or by service of seven years' apprenticeship, to a freeman resident during such apprenticeship within the city, and no other:—another striking specimen of the complexity in which these questions may be involved by the doctrine of corporations, and containing only two circumstances which refer to the original nature of burgess-ship, viz., their being of *free condition*, and being *admitted and sworn*.

The same right was repeated in 1795.

STEYNING.

The report, by Mr. Fraser, of the decision in 1792, as to 1792.
Steyning, to which we have before cursorily referred,† shows, in the course of the evidence, that there was a court *leet* within the borough, at which there was a *jury*, and the headborough, as the under constable, always returned a *list* of persons liable to serve on the jury; and that the jury returned one constable for the next year—and the constable of the year named another, one of whom the steward appointed. Another witness stated (according to the common law) that *all the inhabitants* within the borough were summoned to the borough court leet. Another witness spoke of persons, a short time before the election, boiling their pots in the streets to make themselves conspicuous as inhabitants; and the steward of the borough was called, and produced proceedings at the *court baron* and *court leet* of the borough, Court leet.
from 1675 to 1723; and it appeared that those courts were usually held upon the same day, but no court baron had been held since 1730. *Presentments* at the *view of frank-pledge*, were produced, as well as at the court baron with respect to the tenure, fealty, and reliefs.

In the result the committee, by their determination, which

* 4 Doug. 480.

† See before, p. 97.

George III. we have previously given, decided most properly that the
 1792 Right. right of voting or burgess-ship was not confined to the house-
 holders of *ancient* burgages ; but according to the principles
 before urged, it extended to all the inhabitant householders
 in the borough, whether old or new.

LISKEARD.

The court-leet is also mentioned in the reports of the
 Liskeard cases by Sergeant Peckwell.

This place* had been created a borough in the reign of
 Henry III.† Its decenna was mentioned in the time of
 Richard II.,‡ and received a charter of incorporation from
 Queen Elizabeth.

It became the subject of parliamentary investigation in
 the 44th of George III. upon a petition of appeal, under the
 1804. statute of the 28th George III., c. 52, s. 26,§ against the
 decision of the committee in 1803, who had decided that the
 elective franchise was vested in the " mayor and *burgesses* of
 the borough," and *not* " in the *inhabitants* paying, or liable
 to pay, *scot and lot*."¶

Petitioners To support the claims of the latter, the constitutions of
 1587. the borough, which had been made in the 30th of Elizabeth,
 were produced in evidence ; commencing by a recital, that for
 the better government of the *burgesses* and *inhabitants*, the
 mayor and eight chief counsellors, (in accordance with the
 charter of Elizabeth) had, together with the *general consent*
 of the residue of the *burgesses and inhabitants*, agreed—that
 nine of the chief inhabitants should be reputed to be the
 superior burgesses, chief masters, counsellors, and governors
 of the town.

Constitu-
 tions.

That there should be fifteen others of the most sufficient
 of the residue of the *burgesses*, who should be reputed the
 inferior burgesses, as the homagers at law days.¶ That
 they should not be removed from their offices during life,
except they departed or dwelt out of the town or borough, &c.

* See before, p. 464. † See before, p. 753. ‡ See before, p. 1403.

§ 2 Peck. p. 175. ¶ See Peck. p. 111.

¶ The law day is clearly the court leet ; but the homagers belong to the court
 baron.

That no persons should be elected mayor, constable, &c. &c. George III.
1804.
who was not at the time of such election, a *burgess com-
morant, inhabitant and dwelling* within the town.*

That all offices to be disposed of by the town, should be held only *durante bene placito*.

That no *burgess or inhabitant* should sue or implead out of the borough, any *burgess or inhabitant* in any foreign court, concerning matters determinable within the same, upon pain of fine and disfranchisement.

That every *burgess* should once a year pay one penny of silver,† in testification of his *burgess-ship*.

That if any *burgess, or other inhabitant*, received or admitted any *stranger to dwell* in any of their houses within the borough, without license of the mayor, five of the masters, and eight of the fifteen, and did not remove such stranger within one quarter of a year, after warning from the mayor, should forfeit 10*l*.

That every *town-born child* should pay for his fine of *burgess-ship* 5*s.*; and every stranger 13*s.* 4*d.* The difference in the *fine* between a town-born child and one who was a stranger, is reasonable enough; but there is no other distinction as to the right of any other inhabitant householders to be admitted.

That no inhabitant be made a *burgess*, without the council of the whole town be called for receiving him.‡

The following entries are to be found upon the court rolls, commencing in the 13th of Henry VII., and terminating in the third of Charles II. 1497.

“ At this court, came W. C., and J. C., and did fealty to the mayor and commonalty, to become free *burgesses* of the borough, and each of them gave for a fine 2*s.* 6*d.*” 1498.

“ 8 Henry VIII.—At a law court held on Thursday next after the feast of the Epiphany, J. R., and J. M., made 1517.

* These would form the proper description of a suitor at the court leet.

† This is the *cert* money—*certum letæ*—or *cense* money—of which mention has been before made.

‡ This also is consistent with the general law, as the other *burgesses* were to judge either by themselves or the jury, of their fitness by condition, station, and character.

George III. fine to be free burgesses, and they were *sworn*, and gave for
 1804. a fine 2s. 6d."

1531. "22 Henry VIII.—At this court, came J. R., and J. H., and prayed of the mayor and commonalty license to be *burgesses* within the borough, according to the ancient custom of the borough, and they were admitted by their *oaths*."*

1603. 2 James I.—The following lists are contained in the court books:—

1. Names of the free tenants . . 65.
2. Names of the burgesses . . . 69.
3. Names of the *resiants* 53.

It appeared that some of the names had been struck out of the last list, in consequence of the persons having been admitted to the freedom of the borough, on payment of fines and being sworn.

1607. "4 James I.—At a *law court* and *view of frankpledge*, the *jury* present, J. T., for that he keepeth a public shop within the liberty, not being a burgess," &c.†

"At this court, S. P. is admitted to be a burgess within the borough, and to have the liberties, privileges, and franchises: and he found *pledges* for his fine, and is fined 13s. 4d., because he was *born* without the borough."

There are three other similar entries—"R. C.'s fine was 5s., because he was *born* within the borough."

1686. In the 36th Charles II., a writ of *quo warranto* was brought against the borough, upon which the mayor and Surrender. capital burgesses surrendered their liberties to the Earl of Bath.

James II. granted the burgesses another charter,‡ by which 21 persons were declared to be free of the borough—most of them of high rank, and *non-residents*.

* There are many similar entries.

† See before, Yarmouth, Lynn, and Chester leet rolls.

‡ An alderman of the name of Hoblyn stated, that "it was never regarded by the corporation but as waste paper, and was only taken out of the corporation chest in 1793, in consequence of a subpoena duces tecum having been issued at the instance of Lord Eliot, but that the charter of Queen Elizabeth had always been in force and acted upon."

In the fourth year of the same reign, in consequence of a ^{George III.} clause in the charter, eight burgesses were disfranchised by ^{1688.} order of the king, amongst whom were the Earl of Radnor, and Sir John Coryton, &c.

Liskeard first sent members to Parliament in the 23rd of ^{1294.} Edward I.

The indenture of return in the sixth and seventh of Edward IV., was made by "the bailiff of the borough and all others his *comburgesses*," who elected two burgesses *commonant*. In the first and second of Philip and Mary, by the "mayor and burgesses, *inhabitants* of the borough."

In the fourth and fifth of Philip and Mary, "the whole town and burgesses elected." In the 26th of Elizabeth, "by the mayor and *burgesses*, with their unanimous consent." In the 12th of Anne, "ex unanimi consensu." 1 George II., by "the mayor, six capital burgesses, and 29 other names." &c.

Evidence as to the *usage* was also given, from which it appeared, that, in 1761, a Mr. Morshead, upon an election, canvassed none but the *freemen*—and the usage, as far back as the testimony of aged persons went, proved that "the mayor and freemen only," exercised the elective franchise.

The committee decided, that the right was "in the mayor ^{Right.} and *burgesses* of the borough:" which, in form at least, was a determination consistent with the general law, however the term burgess may have been misapplied.

CHIPPENHAM.

Chippenham,* the history of which we have already detailed, became again the subject of parliamentary investigation, in 1803: and the following statements of the right were ^{1803.} delivered by the parties.†

For the petitioner—that it was "in the bailiff, burgesses, ^{Petitioner.} and freemen, being householders of, and resident in, the "ancient burghage houses within the borough."

For the sitting member—that in was "in the bailiff and ^{Sitting member.} burgesses at large; that is to say, being *inhabitants* "within the borough, paying, or liable to pay, poors' rates."

* See before, pp. 153, 1181, 1189.

† 1 Peck. 260.

George III.

1803.

In the course of the discussion, the following propositions were acquiesced in by the committee; showing the intricacy in which the right of *election* in Chippenham was involved, by departing from the simple system of the inhabitant householders voting—and adopting the technical grounds upon which the supposed right of the *ancient* houses was founded.

1. "The vote of a freeman, being the bona fide householder of, and resident in, an *ancient* burgrave house within the borough, was good, notwithstanding he had taken into his house lodgers or inmates.

2. "The vote of such person was good, though some stable, malt-house, or out-building, yard, garden, or field, which could be proved to have been at some former time occupied together with the house, was in the occupation of a different person.

3. "The vote of such person was good, though his house did not cover the whole site occupied by the former house; no vote having been ever tendered, nor any burgrave privilege ever exercised, in respect of the residue.

4. "The vote of such person was good, though another house stood on part of the old site; no vote having been ever tendered, nor any burgrave privilege ever exercised, in respect of such other house."

The committee decided, that the statement delivered by the petitioner was the right of election—and he was seated accordingly.

EVESHAM.

One other case, which has already been the subject of some observations, requires to be mentioned.*

Evesham was originally an ecclesiastical possession: but in the reign of Edward I. it had its *burgages*. It is said to ~~have~~ returned members at that period; ~~but that fact is doubtful~~. The "good men" of Evesham received a charter from that king, and another from Henry IV. Its *law day*, or *court leet*, and the *steward* and *jury*, are mentioned in the reign of

* See before, pp. 211, 526, 651, 791.

+ 3 Oct. 23-24. 1803. to meet 15th Nov.

Ret. M. L. to the 15th Oct. 97.

Edward IV. And further minute particulars respecting that ^{George III.} court are to be found in the reign of Queen Elizabeth; and ^{1592.} the franchised and disfranchised men are spoken of. It was restored to return members to Parliament in the reign of James I.

In the ~~third~~ ^{1st} year of which reign, the following charter ^{1605.} was granted to it; commencing with a recital, that the borough was ancient and populous—that the *burgesses* had, from time immemorial, sometimes been called by the name of bailiffs, aldermen, and burgesses of the borough; and sometimes by other names, and had enjoyed divers liberties, &c. by reason of charters, and divers *prescriptions*, and usages, within the borough *anciently* accustomed. That the town of Bengworth adjoined the borough of Evesham, and that many dissensions and violations of the peace were committed, without punishment, within the town of Bengworth, through the defect of good government, to the great damage, as well of the *resiants and tenants* within the town, as of the *burgesses and inhabitants* of the borough of Evesham; for which reasons, as well the bailiffs, aldermen, and burgesses of the borough of Evesham, as the tenants, *resiants*, and *inhabitants* of the town of Bengworth, had humbly besought the king to create, as well the bailiffs, aldermen, and burgesses of the borough of Evesham, by whatsoever name or names of corporation or incorporation, they theretofore had been incorporated, as *the tenants, resiants, and inhabitants* of the Corporate town of Bengworth, into one body, corporate and politic, by the name of the “mayor, aldermen, and burgesses of the borough of Evesham, in the county of Worcester.” The king, therefore, granted, for the better keeping of the peace, and for the government of the borough and town, and of the people there *inhabiting*, and of all others thereto resorting, that the borough of Evesham, and the town of Bengworth should from thenceforth be one undivided and free borough, of itself; and that as well the bailiffs, aldermen, and *burgesses* of the borough of Evesham, as the tenants, *resiants*, and *inhabitants* of the town of Bengworth, and their successors, whether theretofore lawfully incorporated or

Free
borough.

Vide Major Hist: of Evesham: p. 176. where
Charter is accurately arranged.

George III. not, should be from thenceforth one body corporate and politic, by the name of "mayor, aldermen, and *burgesses* of "the borough of Evesham, in the county of Worcester," &c. &c.

Powers are then given for the election of seven burgesses, who were to be called "aldermen"—and 12 burgesses, who were to be called "capital burgesses"—and to have also a recorder and chamberlain—all of whom were to be the common council, from which one was to be annually elected as mayor. Also 24 burgesses of the borough, who were to be called assistants—to be aiding and assisting the mayor in all business, &c. respecting the borough.

Common
council.

The mayor, aldermen, recorder, chamberlain, and capital burgesses, to make statutes and ordinances for the government of the borough, the inhabitants, and *resiants*, &c. The first mayor, aldermen, and capital burgesses, were named and appointed.

The aldermen, as vacancies occurred, were to be elected by the common council, from the capital burgesses. The capital burgesses, by the common council, from the burgesses.

Resiants. That one of the *resiants* and *inhabitants* of Bengworth was to be elected to the mayoralty every seven years: and four of the twelve capital burgesses—and eight of the 24 assistants, were to be inhabitants and *resiants* within the parish of Bengworth.

The high steward, recorder, and chamberlain, were named and appointed.

Members
of parlia-
ment.

And it was directed, that there should be, within the borough, two burgesses of Parliament; and that the mayor, aldermen, burgesses, and their successors, upon any writ of election of burgesses of Parliament, to them directed, might have power and authority to elect and nominate two discreet and honest men to be burgesses of the Parliament for the borough. *

A grant of fairs and markets then follows, with a clause "that *no stranger*, not *being a burgess* of the borough, should sell, or expose to sale, any merchandise, &c. except in gross,

within the borough or liberties, unless in the time of fairs or markets, &c., under pain of the goods being forfeited.”

George III.

1605.

A view of frankpledge of all the *inhabitants* and *resiants* is granted to the mayor, aldermen, and burgesses, “and the mayor, aldermen, and capital burgesses, have authority to choose as many persons *inhabiting* and *residing*, as well without the borough as within, to be *burgesses*,”* as to the mayor, aldermen, and capital burgesses should seem most conducive to the public good and advantage of the borough, in the same manner and form, and under the same corporal oath, to be taken by every of the *burgesses* so chosen and assigned, as the *burgesses* within the borough of Evesham used formerly to take; and that such *burgesses* might enjoy all liberties, &c. which had been granted to the bailiffs, aldermen, and *burgesses* of the borough of Evesham, by that or any other name or names whatsoever theretofore incorporated,” &c.

Frank-pledge.

Burgesses.

It appears from the recital of this charter, that Evesham was previously a borough; and in the subsequent description of the place, it is stated to be an “ancient borough.” The burgesses are said to have enjoyed, time out of mind, as well by reason of charters as by “prescription,” divers liberties, &c. But considering the documents before stated, the prescriptive existence of the borough appears decidedly negatived; and some of them seem to import, even to a period but little antecedent to the charter, that Evesham, though a town of importance, was not a borough.

It has been erroneously assumed, that the recital of this charter “affirms the prescriptive existence of the *corporation*,” but there are no words to justify such a conclusion, the prescription being confined to the *borough*.

Corporation.

If the charters to Evesham, coupled with the resolution of 1669, be accurately considered, it will be found that the right of election is constitutionally vested in the “*burgesses*” at large. The only question is, who they are?

* This charter, like many others, speaks only of the “*burgesses*,” not of the *freemen*: and yet the *freemen* are the persons who, in modern times, have exercised the privileges.

George III.

There was before this charter no express provision for making or electing burgesses ; and therefore there must have been some mode by which they were previously made or designated. Considering the documents before stated, no person can reasonably doubt that they were the *inhabitants* of the borough—that they were designated as such by being suitors of the court *leet*, as *residents* ; and that they were made, by being *sworn* at the court leet, before which they were not, in fact, “*legales homines* ;” nor, in reality, known or recognized by the law, otherwise than as villains, inmates, or vagrants.

Leet.

✕ Evesham received another charter in the third year of James I., commencing with a recital in every respect similar to that of the preceding ; with the usual corporate powers.

1605.

The boundaries of the borough differ materially from those of the first charter.

The appointment of the mayor, aldermen, recorder, and capital burgesses is then regulated, with a clause respecting the 24 *assistants*.

It should be observed, this clause does not appear to be now acted upon, as there are no assistants : though, from the documents hereafter referred to, it is clear the assistants existed in the borough for a long time after the granting of this charter ; and should this integral part of the corporation be extinct, and not capable of being revived, it may be an important question, how far the corporation is or is not thereby dissolved.

This charter, containing provisions in every respect substantially the same as that granted in 1603, it is not necessary to make any further extracts.

It has been assumed, that it draws an evident distinction between the *burgesses* of Evesham, who were incorporated ; and the *resiants*, *tenants*, and *inhabitants* of Bengworth, who were not incorporated ; and therefore it becomes requisite to consider the constitutional effect of that part of the charter.

It seems that Bengworth, before that time, formed no part of the borough, the *resiants* there not owing suit at the court leet of the borough, nor being incorporated. The con-

Burgesses.

Resiants.

+ vide Map Hist. of Evesham p 176.

sequence of which must have been, that they owed suit as George III.
1605. resiants, either at the sheriff's tourn, or at some other leet; from neither of which could the king's charter altogether discharge them; though it probably had the power to change the *place* or *court* to which such suit should be due. So far the charter could be effectual. As it might also be to incorporate the resiants, tenants, and inhabitants of Bengworth with the burgesses of Evesham: and in that manner give them a share with the burgesses of the privileges enjoyed under the charter of the king. This the king had the power of granting; because that which the king could grant, he might, by the consent of the grantee, communicate also to another. So likewise with respect to the extension of the jurisdiction of the mayor, aldermen, and recorder of Bengworth: for it has ever been the undoubted prerogative of the crown to create, new model, abridge, or extend any of the local jurisdictions, as a part of the executive authority, frequently exercised in the establishing of new jurisdictions, and in the ordinary case of special commissions. But as to the right of electing members to Parliament, that being once vested in any class of voters, could not be transferred to or shared with others by means of the king's charter alone: and, consequently, as the burgesses of Evesham only returned members to Parliament before the second charter of James I., without the parish of Bengworth (which must then have voted for the county members, and contributed to their wages), that charter could not have enabled the resiants, tenants, or inhabitants of Bengworth to share the right of voting with the burgesses of Evesham: or have exonerated them from voting for the county of Worcester; or paying the knight's wages. And this for the most obvious reason; because if the executive power had that prerogative, by the exercise of it the crown might so change the electors in each place, by subtracting from one and adding to the other, as to gain a universal ascendancy over the voters in general, and so engross in its own power that of the commons—a thing totally contrary to the vital principles of our constitution.

This charter seems also to justify a conclusion against the

George III. elective rights of the corporations: and to establish that
 1606. *burgess-ship* was distinct from incorporation. The burgesses
 Incorporation. of Evesham appear to have been the same class of persons
 Burgesses. as the *resiants*, *tenants*, and *inhabitants* of Bengworth, with
 whom they were joined: the latter being called by those
 names because they dwelt in the county at large; and
 the former denominated "*burgesses*," because they re-
 sided within a *borough*. Resiancy and inhabitancy—and
 not incorporation—being the real characteristic of both those
 classes.

The clause as to the creation of burgesses does not speak
 of freemen at all; still less of honorary freemen: and only
 enables the "mayor, aldermen, and capital burgesses, to elect
 "so many persons, as well inhabitant and conversant without
 "the borough as within, to be *burgesses*, as they should
 "think most useful for the public good of the borough."

Inhabitancy. At all events the persons here described are spoken of
 with reference to their *inhabitancy* and *commorancy*. If the
 select body had the general power of making as honorary
 freemen whom they liked, without reference to any local
 habitation, then those terms were unnecessary; because the
 inhabitancy and commorancy would be altogether immaterial.
 To make, therefore, the whole of the words intelligible, some
 other meaning for the clause should be sought for. And if
 it can be found, so as to make the whole intelligible and
 consistent with the other parts of the charter, and the general
 law, it should be adopted. Now the charter adds Beng-
 worth. worth to the borough; without therefore any straining of the
 words of the charter, the *extra burgum* may be applied to
 Bengworth, and then the power would be to make any
 person inhabiting or commorant within the borough of Eve-
 sham, or without the borough in Bengworth, a burgess of
 Evesham; which construction is confirmed by the direction
 at the close of the charter, that the persons so made bur-
 gesses should take the same oath as the burgesses had been
 theretofore accustomed to take. That oath was an oath at
 the court leet, which none could take but *resiants*.

The effect of the clause would then be, to give to the select

body of the corporation the power of adopting or rejecting with regard to their condition, station, and character, any of the inhabitants or commorants of the place; which selection used before to be made by the *jury* at the *leet*, under the sanction of their *oaths*, and not arbitrarily, or at their pleasure. The power, so given to the select body, if confined to admission to the corporation alone, might be legal; but if it was intended to extend to the suit at the leet it was illegal, because the king could not dispense with that suit, and of course he could not give to his grantees the power of enforcing or dispensing with it at their pleasure, but only subject to the above considerations.

George III.

1605.

Leet.
Jury.

It is equally illegal if it extended to the elective franchise, for the reasons which have been given before. As the grant of the king it should, if possible, be taken to be legal. And therefore should be treated as applied only to admission into the corporation, and not to the suit at the leet, or the voting for members of Parliament, or, in other words, not to the original *burgesses*.

In the reign of Charles I., and Charles II., a few municipal documents require to be mentioned.

In the fifth year of Charles I., it was ordered, that Mr. ——— Davis, *minister—admitted into the liberties of this borough, and made a freemen thereof**—should take no benefit: but the admission by Mr. Hollam, late mayor, should be void, which is done, not out of any dislike to Mr. Davis, but the same not being done by the public consent of the mayor, aldermen, and burgesses.

1629.

And it is ordered, that the mayor hereafter shall not, without the public consent of the mayor, aldermen, and *burgesses*, admit any one in the *liberty of the borough*, nor make any one free under the penalty of 20l.

Signed by the mayor, recorder, and 10.

In the 23rd of Charles II. is the following entry:—

1671.

Whereas by the interruption of the late times, it hath been omitted to *enrol* and *swear* many persons within this

* See note before, p. 2145.

George III. borough, as was heretofore usual; therefore it is ordered
 1605. that all such persons, *inhabitants of this borough*, as ought to take the oath, do, upon summons to them given, appear before the mayor and chamberlain to be sworn.

1674. Three years afterwards an order recites, that for divers years last past, and specially in the time of the late mayor, there were many omissions and neglects incurred within this corporation, touching the government thereof; insomuch, that unto this present time it labours under the inconveniences which then took root, and especially many mistakes are arisen, and like to arise, by reason of the non-enrolment of apprentices, and enfranchisement of them, according to the ancient and laudable custom of this and all other well-regulated cities and places. And forasmuch as the *grand inquest* of this borough, at the last Michaelmas sessions, *presented* the premises as a great grievance, it is ordered, that every tradesman that shall take an apprentice within the borough, shall within one week, cause the same to be *enrolled* in the chamberlain's book. And it is ordered, that every person who has a right to his freedom, shall come and appear before the mayor and chamberlain, at a certain day and time to be fixed, to be *sworn* as accustomed.

1699. Evesham, like other places, surrendered its charters in the reign of Charles II.: and was restored by the proclamation of James II.

Freedom by apprenticeship, commorancy and inhabitancy, are mentioned in the records of the borough of that reign: as well as the companies and fraternities.†

In the 21st of Charles II., a report upon a petition from this borough, stated the question to have been—whether the mayor, aldermen, and capital burgesses only, or the *burgesses* at large, had the right of election.

And it was resolved, that the common *burgesses* had voices in the election, and that the choice by the mayor, aldermen, and chief burgesses, was not good.

The House subsequently confirmed the decision of the committee.

* See before, p. 1825.

† See before, p. 1829.

At the election in the 42nd of George III., the votes of ^{George III.} the *freeholders* were tendered; but they were objected to, 1802. and after consideration rejected. This was the first and only time, in which their votes were called in question; till the petition in 1808, when their right was negatived. In consequence of their requisition in 1802, actions were brought against the mayor; but they were afterwards discontinued, and costs paid to him.

The parliamentary rights of Evesham, were again the sub- 1819. ject of contention in 1819.* And it was questioned whether the right was vested "in the mayor, aldermen, capital " and other burgesses, members of the corporation;" or "in ^{Petitioners} " the mayor, aldermen, and *freemen* of the borough, and in ^{Sitting} " the *inhabitants* of the borough, paying scot and lot:" the ^{members.} principal question being, whether under the resolution of 1669, "common burgesses" only meant such members of the corporation as did not come under the description of "the mayor, aldermen, and chief burgesses."

The petitioners gave in evidence the charters of the ^{Evidence.} first and third of James I. The parliamentary returns from the first of James I., to the 21st of Charles II.; and the determination of 1669. It was urged for the petitioner, that to ascertain the meaning of the word "burgess," it was requisite to refer to the charter of James I., as no evidence could be found of an earlier date. That the returns to Parliament had since that charter been made by the corporation; and that if the other inhabitants had not taken a part in the election, having a right so to do, it was but just they should suffer for their negligence; † and that if the inhabitants had a right, the committee in 1669 would have named them in their resolution.

For the sitting member it was contended, that in the ^{Burgess.} ancient charter the word "burgess" imported "inhabitant," ^{Inhabitant.} for which position the cases of Aldborough, Abingdon, and St. Ives, &c. were cited, and it was urged that neither the

* Corbett & Daniel, 26.

† It should be remembered, that the right of returning members to Parliament is a right for the public—or rather a duty—which could not be lost or thrown off by neglect or non-user.

George III. charters, returns, nor usage, could confine the interpretation of that word "burgess," to mean members of the corporation only.

Right. The committee decided, that the right was in the "mayor, aldermen, capital and other burgesses, members of the corporation."

This is the most express decision in favour of the right of the corporation, to be found in the reports; and could have proceeded on no ground, but the assumption that the right was given to the corporation, by the charter of James I.:—a position which appears to involve the unconstitutional principle, that the king by his charter could declare what class of persons should be the electors of members of Parliament.*

LIVERPOOL.

Liverpool is a place of too much importance to be passed without a few remarks.

Burgesses. It is not mentioned in Domesday,† but its burgesses are referred to in a charter, quoted in the reign of King John;‡ and in the reign of Henry III. the burgesses obtained a charter to them and their *heirs*: and the grants of King Heirs. John, Henry III., and Edward III., were confirmed by Richard II.,§ and again by Henry IV. and Edward IV.

A long petition to Parliament occurs in the reign of Henry V., in which the *burgesses* and their *burgages* are mentioned.

1555. In the second and third years of Philip and Mary, the previous charters were inspected and confirmed; and it has been said, that one was granted by Queen Elizabeth, but none such is to be found.

1636. The next which appears is in the second year of Charles I. which commences with a recital, that the town of Liverpool was an ancient and populous town, and the sole port in the county palatine of Lancaster.

* It was expressly and justly declared by Lord Mansfield, that the assembling to elect members to Parliament, was not a corporate meeting. See the *King v. Corporation of Wells*, 2 Burr. 4003.

† See before. p. 413. ‡ See before, p. 461. § See before, p. 738, 794.

That the mayor, bailiffs, and burgesses, from time immemorial, had enjoyed divers liberties, &c., by reason of charters that had been granted to them, by the name of "mayor, bailiffs, and burgesses, of the town of Liverpool, in the county of Lancaster," and also by prescriptions and custom.

George III.
1626.

That the mayor, bailiffs, and burgesses, had besought the king for the government and advantage of the town and port, by whatsoever name of incorporation, or whatsoever names of incorporation, the mayor, bailiffs, and burgesses had been incorporated, or whether they were incorporated or not—to create them a body corporate, &c.

The king accordingly granted, that the town of Liverpool should for ever be a free town of itself, and the burgesses and their successors, one body corporate and politic, by the name of "mayor, bailiffs, and *burgesses*, of the town of Liverpool;" and that they should have perpetual succession, &c.

That there should for ever be one burgess to be mayor—two to be bailiffs.

A power is then given to the mayor, bailiffs, and burgesses, to assemble and make bye-laws for the government of the town, upon public notice given for that purpose.

The first mayor, (Lord Strange) and two bailiffs, are then named and appointed.

And it was granted that the mayor, bailiffs, and *burgesses* might assemble yearly, to choose and name one of themselves to be mayor, and two of themselves to be bailiffs.

Mayor.

That the mayor, bailiffs, *burgesses* (and a clerk, appointed to take recognizances) might have power to take recognizances, according to the form of the statute merchant, and statute of Acton Burnel.

The first common clerk being named and appointed, the mayor and senior alderman were directed to be justices of the peace; with the same powers within the town, as justices have in the county.

Justices.

All the lands, &c., which the mayor, bailiffs, and *burgesses* ever had, are confirmed to them; reserving the usual rents that had been hitherto paid.

The borough was governed under that charter, till the 29th 1677.

George III. year of the reign of Charles II., when some persons surreptitiously obtained another charter of that date, giving the principal power of the borough to a *common council* of 60.* But the *burgesses* at large protested against that grant, and several of the common councilmen refused to act under it. Nevertheless that body appear to have continued to exercise their authority until the charter of the seventh of William III. :† and their proceedings against the *inhabitants* appear to have partaken of the violence of those times.

Surrender. Chief Justice Jefferies demanded a surrender of their charter; which was delivered to him, but soon after returned.

However, it being affirmed to have put an end to the privileges of the town, an application was made to James II. for a new charter, which was accordingly granted in the first year of his reign; and confirmed the former mode of electing the common council.

It contained the objectionable clause, making all the officers of the corporation removable at the pleasure of the crown; and having been forced upon the burgesses, it was not accepted; but declared null and void.

1687. "At a court at Windsor, the 14th of August, 1687. The king's most excellent majesty present in council. Whereas by the charter granted to the town of Liverpool, a power is reserved to his majesty, by his order in council, to remove from their employments any officers in the town: and his majesty having received information of the misbehaviour of Oliver Lyme, deputy mayor of Liverpool, and Sylvester Richmond, justice of the peace there, hath thought fit this day in council, to declare his pleasure, and doth accordingly order, that the said Oliver Lyme, and Sylvester Richmond be, and they are hereby removed and displaced from their respective offices in the town of Liverpool."

1688. The king having exercised this power, the corporation became alarmed; and in the 12th of September in this year, they made an order, that "with all due submission and humble deference to the power of removing any officer in this corporation, James Prescott, Esq. mayor for the time being,

* See before, p. 1704.

† See before, p. 1710.

“ should safely keep the wand, mace, and sword, with all George III.
 “ other real and personal estate of the corporation, and all 1696.
 “ that concerned the same, for the defence of its rights, where-
 “ with he was intrusted, until a successor should be legally
 “ chosen and sworn, according to the charter and the ancient
 “ custom of the corporation.”

Soon after the Revolution, the *common council* obtained a Will. III.
 new exemplification of the charter of Charles II. and dis-
 owned the charter of James, as having been founded on a
 pretended surrender which was never recorded. And in the
 same year in which the charter was granted by William
 III., the *common council* made an order, in which they
 said, that “ endeavours were used to take away or make
 “ void the charter of Charles II., under which the corpora-
 “ tion derived many great privileges and immunities;” and
 directed, that “ the mayor and bailiffs shall, at the charge
 “ of the corporation, use their utmost endeavours to preserve
 “ the same.” 1696.

The king subsequently granted the charter under which
 the corporation is now regulated.

It commences with an *inspeximus* of the charter of
 Charles I., which it confirms; and then recites, “ that a
 “ few of the *burgesses* of the town, by a combination among
 “ themselves without the assent of the greater part of the
 “ *burgesses*, and without a surrender of the charter of Charles
 “ I., or any judgment of *quo warranto*, had procured the
 “ charter of Charles II.; in which sundry material changes
 “ were designed to be made in the government of the town,
 “ which had caused many differences and doubts concerning
 “ the liberties, franchises, and customs of the town; and also
 “ concerning the election and appointment of the mayor, and
 “ divers other officers.”

The charter then appoints a common council of 41 bur-
 gesses, one of whom was to be mayor, and two bailiffs—
 and by a subsequent clause, it directs, that upon the removal
 or death of the mayor, recorder, town clerk, bailiffs, or
 common council, another fit person should be elected by *such*
persons, and in such manner, time, and form as in that parti-

George III. *cular was used and accustomed, before the making the charter*
 1695. *of Charles II.*

This clause is in the same words as that of the charter of James II., excepting that in the latter, the election is directed to be "*as theretofore accustomed,*" and in that of William III., "*in the same manner as before the charter of Charles II. ;*" *at which time, the common council did not exist by charter, but by delegation from the burgesses.*

The charter of William III. further directs, that the mayor and bailiffs should be chosen *by the burgesses out of the common council.*

Under this charter it might have been expected, that the *burgesses* would again have entered upon the exercise of their rights ; but the new common council were soon aware of the power they possessed.

By the charter of Charles I., now again recognized as part of the constitution of the place, no common hall or assembly of the *burgesses* could be held without the assent and presence of the mayor, and one at least of the bailiffs.

The council then existing—without adverting to the distinction between the charter of James II. and of William III., respecting the choice of their members—still continued to elect each other ; and therefore it was not likely that this body would *call together the burgesses* for the purposes of making bye-laws, or being present at such meeting : and consequently nearly a century has elapsed without the *burgesses* at large having availed themselves of the privileges intended to be granted to them.

1735. This extinction of their rights however, was not submitted to without various struggles. In 1735, the mayor of the town, with the concurrence of the bailiffs, called together the *burgesses* in common hall. The assembly was accordingly held, and sundry bye-laws made. But the mayor dying the next year, the common council again assumed the authority and dismissed the two bailiffs from their office of common councilmen ; declaring in express terms, that in holding the common hall they had acted manifestly in breach of the trust reposed in them as common councilmen.

The common council, however, seem not to have been ^{George III.} able to divest themselves of some doubt as to their power of making bye-laws for the government of the town, under the subsisting charter. In order, therefore, to prevent all opposition, they applied, in the year 1751, to George II., to give them a new grant; stating in their petition their former charters, and particularly that of William III.: which they inaccurately describe as ordaining, that “for the future, to “preserve the peace, tranquillity, and good government of “the town, there should be, for ever, forty-one good and “discreet burgesses, who should be called the common “council,” &c., omitting (as they say) to give them the least power in express terms; though it was the manifest, if not the sole intent of that charter, to give the forty-one the power of making bye-laws, as in King Charles’ charter, in ^{1751. Petition.} order to prevent the populous meetings of the burgesses upon every trifling occasion, the town being so much increased since that time. They then suggest to the king, that it may thereafter cause disputes, unless the charter was explained for this purpose, by adding the clause of King Charles’ charter; or in such manner as his majesty should think fit. They therefore requested that the king would give to the select body of the common council the same power of making bye-laws which the body at large possessed under the charter of Charles I.; and they conclude with petitioning, that the mayor might act as justice of the peace for four years; and that the recorder might have power to appoint a deputy. ^{Bye-laws.}

This petition was referred to the then attorney, and solicitor-general, Sir Dudley Rider, and Mr. (afterwards lord) Mansfield, who recommended that the whole should be withdrawn, excepting so much only as related to the appointment of justices of the peace, and the nomination of a deputy recorder. To which recommendation the common council prudently assented. And on the report of the attorney and solicitor-general, a new charter was obtained, which granted their request, and confirmed all former privileges; but left the common council, as to their legislative authority, in the

<sup>New
charter.</sup>

George III. same situation in which they stood under the charter of
 1751. William III.

The common council, however, still continued to make bye-laws:—but they were rarely acted upon—and, in case of resistance, were never enforced by legal proceedings. Few of them have at present any active existence.

The receipts and expenditure of the large income of the corporation have rested entirely with the common
 1791. council.

In 1791, a majority of the *resident burgesses*, presented a petition to the mayor and bailiffs, requesting them to call together a general assembly of the *burgesses* in the common hall.

These officers complied with the requisition. And such meeting was accordingly held, and numerously attended. Measures were taken for bringing to trial at law, the important questions which had been so long the subject of debate among the burgesses, viz.—in what part of the corporation the making of bye-laws, and electing the common
 Trial. council resided.

A cause respecting the bye-laws, was tried at the assizes at Lancaster, in the same year, before Baron Thompson. Verdict. Mr. Erskine being leading counsel for the select body, and Mr. Serjeant Adair for the burgesses. The jury found that the power of making bye-laws was under the charter of Charles I.—recognized by that of William III.—expressly given to the corporation at large; the Judge having directed them that “*no evidence of a custom ought to be admitted against the express words of a charter.*”

New trial. A motion was afterwards made in the Court of King's Bench, for a new trial: when, after a long argument, the Judges of that court were of opinion that the evidence of the custom ought to have been admitted, and directed a new trial, which came on the following year. The records of the town were produced and given in evidence to prove the usage; but the second jury were also of opinion that no practice could be legal which was in direct opposition to the clause in the charter of Charles I., giving the power of

making bye-laws to *the mayor, bailiffs, and burgesses, on public notice for that purpose.* And they gave a verdict against the claim of the common council.

George III.

1792.
Verdict.

A third trial was then moved for, which the Court of King's Bench, on what ground does not appear, thought proper to grant. But the expences incurred in these proceedings, deterred the burgesses from a further prosecution of their claim. And the common council, notwithstanding the opinion of the two juries, still continued to exercise the exclusive power of the corporation in the same manner as before the proceedings were commenced.*

The question respecting the right of electing the members of the common council, was also tried. The *burgesses* contended, as the charter of William III. referred to the custom before that of Charles II.—at which time the common council existed, not by charter, but by the appointment of the *burgesses*—that they had the right to elect. The *common council*, on the contrary, contended that the charter of William meant to refer to the actual practice before the charter of Charles II. On this point the jury were of opinion in favour of the former custom, and gave a verdict accordingly. The event of this contest, and the celebrated Chester cause, in which a solemn decision of the House of Lords was obtained by the exertions and expence of an individual, without producing the least change in the practice of the corporation, shows how essentially necessary it is that some change should be effected on general and uniform principles.

Common
council.

* The population of Liverpool amounts to upwards of 80,000 inhabitants. In 1830, 4,001 voted as freemen—360 of whom were non-residents:—notwithstanding the charters speak only of *burgesses*, and evidently refer only to local privileges to be enjoyed by residents. The Reform Act has also continued the right of the freemen and non-residents within seven miles.

CHARTERS.

The following are the charters granted by King George III.

- | | |
|-------------------------------|----------------------------------|
| 1.—1762, 3 George III. | Colchester. |
| 2.— | Winchester. |
| 3.—1763, 4 George III. | Bath. |
| 4.— | Carmarthen. |
| 5.—1769, 10 George III. | Exeter. |
| 6.—1773, 14 George III. | Helston. |
| 7.— | Saltash. |
| 8.—1795, 36 George III. | Northampton. |
| 9.—1797, 38 George III. | Bodmin. |
| 10.—1803, 44 George III. | { Weymouth and
Melcomb Regis. |
| 11.—1809, 50 George III. | Maldon. |
| 12.—1813, 54 George III. | Lampeter. |
| 13.—1818, 59 George III. | Lancaster. |

1. *Colchester*, we have already seen, was in consequence of the corporation then existing, not being able to act.*

2. *Winchester* was merely a grant and release of part of the fee-farm.

3. *Bath* was a charter of incorporation, but its history has already been given.†

4. *Carmarthen* was also a charter of incorporation, but immaterial to our inquiry.

5. The charter to *Exeter* was granted for the purpose of giving additional justices.

6. The *Helston* charter was in consequence of the old corporation being reduced to such a state that it was incompetent to act.

1774. The following is a short extract from that charter, as a specimen of grants of this description.

It commences with a recital of the charters of the 27th Elizabeth, and the 16th of Charles I. ;‡ after which it states,

* See before, p. 1964 ; and 2 Doug. 58.

† See before, p. 1965.

‡ See the alterations which were recommended by the attorney and solicitor-general, to be made in this charter. 2 Doug. 54.

that it appeared by petitions from the merchants, tradesmen, *George III.*
inhabitants, and freeholders of the borough of Helston, 1774.
 that several disputes had arisen, and informations in the
 nature of quo warranto had been prosecuted in the Court of
 King's Bench, and judgment of ouster obtained against *Ouster.*
 several persons, for acting as mayors within the borough—
 and also against one of the aldermen, and divers of the
 freemen;—and by the natural death of other aldermen, the
 corporation was in danger of being dissolved, and incapable
 of exercising its liberties.

The king then incorporates the *burgesses* by the name of *Burgesses.*
 the mayor and *commonalty*, with all the usual corporate pri-
 vileges; and intrusts the government of the city to a mayor,
 four aldermen, and an indeterminate number of *freemen*: *Freemen.*
 the clause for the election of whom is as follows—"That
 the mayor, or his deputy, and the aldermen of the borough
 of Helston, or the major part of them, shall for ever here-
 after elect and admit such, and so many of the more dis-
 creet, honest, and quiet *men*, and *inhabitants* of the borough, *Men.*
 to be *burgesses and freemen*, as to them shall, from time to
 time, seem necessary or proper."

7. *Saltash* being similarly situated with Helston, also
 received a new charter.

8. The next grant was to *Northampton*,* the early his- 1796.
 tory of which was given in a previous part of the work.†

This charter is peculiar, and commences by reciting, that
Northampton was a town, very ancient and populous, and
 from ancient times had been a town incorporate; and that
 the mayor, bailiffs, burgesses, and the *inhabitants*, had held *Inhabitants*
 divers liberties, &c.

That the king had been besought to confirm all the char- *Petition.*
 ters, &c., granted to the mayor, bailiffs, and burgesses, or
 their predecessors, by any name of incorporation whatsoever;
 and whether such mayor, bailiffs, and burgesses, were then
 a corporation or not—with such additional privileges as
 should seem expedient for the public good of the town, &c.

* Pat. 36 George III. p. 6, n. 1.

† See before, pp. 219, 247, 467, 883, 1037, 1181, 1741.

George III. The king then grants, that the town of Northampton should be a free town; that the *burgesses*, and their successors, should be one body, corporate and politic, by the Name. the name of "the mayor, bailiffs, and burgesses, of the town of Northampton"—with the usual corporate powers. That one of the most honest and discreet burgesses of the town should always be called the mayor; two of the most honest and discreet burgesses should be called the bailiffs; and forty-eight honest and discreet men, *dwelling* and *abiding* within the town, who had never been mayors or bailiffs, the company of eight-and-forty, &c.

1797. 9. *Bodmin* also received a charter of incorporation.

10. The next to *Weymouth*, was explanatory of some of the privileges which had been before granted.

11. The 11th was a charter to *Maldon*, which, like those to Colchester, Helston, and Saltash, was in consequence of the former grants having become ineffectual.

12. The 12th to *Lampeter*, was a charter of incorporation, giving particular regulations and authority for the future swearing of the officers and burgesses, in consequence of the old corporation being unable to act.

13. The last to *Lancaster*, was a charter of incorporation.

CASES.

Lord Mansfield. Notwithstanding the encroachments upon corporations made by Charles II. and James II., and the doctrine attempted to be established by Brady, in support of the select bodies—in the reign of George III., particularly during the time of *Lord Mansfield*, some better principles of corporation law were elicited and adopted by that learned and able judge.

Corporation case. The doctrine of bye-laws had been carried to a great extent by the extra-judicial opinion of the judges in the corporation case. But in the 32nd of George II., a bye-law made in the borough of *Carmarthen*, transferring the right of electing the mayor, from the mayor, burgesses, and commonalty, to the mayor and burgesses only, was held to be illegal, and the mayors elected under it were ousted: and

1758.

further limitations were superinduced, upon the generality George III.
1758. of the rule in the corporation case, by subsequent decisions.

Thus it was held, that a bye-law which alters the constitution given by the crown, is bad;* though if that constitution were not in the way, it might be good: as when the freedom of the town was to be conferred only on such as were entitled by birth† or servitude, or by a particular mode of election pointed out—a bye-law that any person should be admitted to the freedom, on payment of a sum of money, was held to be bad, for it altered the constitution.‡ So also it was held, that a corporation by charter could not make bye-laws contrary to the directions of the charter; as where it directed an election to be by the mayor, jurats, and commonalty, they could not restrict it to 60 seniors of the commonalty.§

But in another case from the same borough, it had been before decided, that the number of *electors* might be narrowed by a bye-law; but not the number of the *eligible*.||

However, where a power of *creating freemen* was shown to have been once vested in the body at large of a *prescriptive corporation*,¶ the exercise of it could not be sustained in a *select part* of the same corporation, continued by charters under other names of incorporation; there being no express grant of such a power to the select body by the charters, nor any bye-law to that effect, even supposing such a power could be transferred by a bye-law from the whole to a part of the same corporation, although it was stated in the plea and admitted by the demurrer, that the same power which was *immemorially exercised by the whole body* down to the period of the granting and accept-

* *Rex v. Spencer*—Maidstone case, and see before, as to *usage* at Maidstone, 2041—2043.

† As birth is one ground of parochial settlement, so was it, by the ancient law, the foundation of the claim to *reside* in a particular place. And on that principle a bye-law was framed, that no one, *not born* in such a town, or an inhabitant there *for three years*, shall be allowed to inhabit without a testimonial of his good behaviour.—Hard. 56.

‡ *Rex v. Breton*, 4 Bur. 2260.

§ *Rex v. Cutbush*, 4 Bur. 2204.

|| *Rex v. Spencer*, 3 Bur. 1827.

¶ *The King v. Holland*, 2 East, 70.

George III. 1758. .ance of the charters of James I. and Charles II., had been since those charters, &c. continually *exercised by the select body* in question; and although such charters contained a confirmation of all former privileges, &c. under whatever names of incorporation theretofore enjoyed.

The following cases—some relating to *residence*—occur also in this reign.

UNIVERSITY OF OXFORD.

Oxford
Univer-
sity.

The first as to a claim of cognizance, by the University of Oxford, in an action upon the case, in which the plaintiff declared that she was never guilty of keeping an improper house, but that the defendant, in the county of Oxford, accused her of doing so, and caused her to be arrested, and carried to Oxford in custody, before Thomas Randolph, D.D., and that the defendant at the Quarter Sessions for the county of Oxford, maliciously prosecuted an indictment against the plaintiff, upon which she was acquitted, to the plaintiff's damages, &c.*

The university of Oxford claimed conusance under the charter of the 14th of Henry VIII.; by which conusance of all causes, where either plaintiff or defendant was a member thereof, was given to the chancellor, though the cause of action arose in any part of the kingdom; and it was provided, that no justice (particularly mentioning the judges of the Common Pleas) should presume to intermeddle in any case arising within the jurisdiction of the university. Which charter was confirmed by an *act of Parliament of the 13th of Elizabeth*.

The defendant swore in an affidavit, that he was, and for 21 years past has been, a *member and student* of the college of Christ Church, and that he was *resident* there. Whereupon the court made a rule for the plaintiff to show cause, why the claim of conusance should not be allowed.

Upon showing cause, an affidavit was produced by the plaintiff, swearing that the defendant *generally resided, and was obliged to reside at Benson*, where he had a college

* Mary Hayes v. Samuel Long, Wilson's Reports, 311.

living, and though his name remained upon the books of the college, yet *he had no room or chamber there to reside in* ; thereupon it was insisted for the plaintiff, that conusance of the plea ought not to be allowed to the university for two reasons :—First, Because the cause of action arose at Benson, out of the university. Secondly, That the defendant had no right to the privilege of the university, he having *ceased to reside* there as a student and member thereof.

George III.
Oxford
Univer-
sity.

In answer, it was said for the defendant, that the plaintiff was indicted at Oxford, for keeping an improper house at Benson, and therefore the cause of action arose at Oxford; but however that was, the privilege extended all over the kingdom; and secondly, he was sworn to be a member of the University, sometimes residing there, and sometimes upon a college curacy at Benson.

Lord Camden :—" The charter extends to actions arising in any part of England ; but surely it could never intend that scholars as the plaintiff should have the privilege of suing in the university, in causes of action arising in any part of England ; but when they are defendants, this privilege extends all over England.

" The charter was granted and confirmed by Parliament, to the members of the university, in *consideration of their being resident there*, and the privilege extends from the highest member, to the lowest servant there *residing*.

" The *superior courts construe this privilege very strictly*, therefore it ought to be made to appear clearly to the court, that the *defendant is a scholar residing*. Great numbers of persons remain on the books, long after they have left the university, on purpose to vote for members, &c.

" Many who are fellows of colleges never go thither at all ; I myself was one a long time, and never went there ; it would be strange if this court should allow conusance in cases where such persons are defendants ; it *is therefore absolutely necessary that residence should be proved to the court*. The claim under the seal of the university, says not one word of the *residence* of this defendant, and so we can see why the courts have required affidavits of the residence ;

George III.

Oxford
Univer-
sity.

yet if the chancellor should certify falsely, that a person is resident who is not, there is no doubt but an action upon the case would lie against him, and therefore the chancellors do not choose to certify *residence*; and I am inclined to think the chancellor knew this defendant was not resident, and so did not certify that matter. The defendant's affidavit is a subterfuge under the word '*residence*,' which is indefinite. If a man resides for one night, and swears he was resident, he could not be convicted of perjury. It is certain he is curate of Benson, and has a family there, and *frequently resides* at Oxford, but he does not say how long together."

BEDFORD.

1788.

About twenty years after this case, a different doctrine with respect to residence, appears to have been held in the important case of the King and Heaven, which pursued the authority of the King and Ponsonby,* already a subject of observation.

That case was cited, and it was argued that it had entirely done away with the necessity of residence.

Upon a motion for leave to file an information in the nature of a quo warranto, for usurping the office of alderman of the borough of *Bedford*,† the affidavit on which the rule was obtained stated, that Bedford was a borough and corporation by prescription:—the latter assertion being inaccurate, as has been already pointed out. It was also sworn that it was governed by a mayor, recorder, 2 bailiffs, and 13 common councilmen, and that there was an indefinite number of freemen.

That it was the custom of the borough, for every Burgess who had served the office of mayor, to become an alderman; which office could only be held by persons *resident* within the borough, and every alderman removing from the borough, and no longer continuing to *reside* therein, thereby vacated his office. The defendant served the office of mayor from 1768 to 1769, from which time he executed the office of

* See before, p. 1243.

† Rex v. Heaven, 2 T. R. 772.

alderman, but about 13 years since, he *removed from the* George III.
borough, and has not since resided therein. Bedford.

The defendant denied the usage and custom ;—and further stated he had kept *apartments* in the borough for the greater convenience of attending to the meetings and business of it ; and that he had upon all occasions been ready to attend at the borough, whenever his presence was requisite.

The defendant's counsel also urged, that the necessity for residence within the borough, was entirely done away by the case of the *King v. Ponsonby*—that the corporation had refused to interfere, and that it did not appear any particular duty was required from the defendant, or that the corporation had been injured by his non-residence.

With respect to the constitution of the borough, relative to non-residence vacating the office of alderman, they relied upon the analogous case of *Vaughan v. Lewis*,* Lord Holt having declared, “ the clause was declaratory of the *common law*, and that the non-inhabiting within the borough, was a good cause to amove a member ; but that it did not, ipso facto, determine his office without an actual amoval.”

Lord Kenyon, in giving judgment observed, that “ on the convenience of the thing—on reason by analogy to other cases—and on authority—his ceasing to reside in the borough did not, ipso facto, put an end to his corporate existence. First, in point of convenience ;—*at what time can it be said that he ceased to be a member ?* Was it at the first moment when he left the town ? And shall all those persons who derive their title under him during these last 13 years be declared unduly elected ? Such a doctrine would be productive of infinite confusion and hardship on third persons. Then consider this by analogy to other cases : the statute of Westminster, 2, c. 1, which respects the operation of fines, declares, that fines levied contrary to that statute shall be ipso jure null ; and yet it has been repeatedly determined—that they are only voidable, and must be reversed by writ of error. Then as to authorities : it is true, indeed, that the case in *Carthew* (who in general is a good re-

* Carth. 227.

George III. porter) *was not a judicial authority*. But the parties
Bedford. themselves referred the question to Lord Holt, a lawyer of the greatest eminence, and as far as a point can derive authority from any one person, the opinion of Lord Holt upon this subject has great weight; and he thought, that the office of common councilman did not become ipso facto vacant by non-residence, and that the party did not lose his franchise till a sentence of amotion by the corporation had been pronounced. Therefore, I am of opinion, on reason, on analogy, and on the case cited, (there being no contrary decision,) that there must be a judgment of amotion against this defendant by the corporation of Bedford, for non-residence, before we can interpose by granting an information in nature of a quo warranto against him."

The argument of *convenience* insisted upon by the Chief Justice seems to be questionable. Certainly that part which assumes the difficulty of ascertaining when the residence would cease seems to be untenable, as residence and non-residence, a point so necessary to be established, and in so many instances determined in practice, upon cases of settlement, constables, magistrates, coroners, sheriffs, clergy, &c. Nor was it any greater hardship that those who had derivative titles under persons so circumstanced, should lose their offices any more than on any other ground. But, on the contrary, it would seem a less hardship, because his non-residence must have been notorious; and all who took under him must be assumed to have had knowledge of the fact. According to the principles before quoted from Lord Mansfield,* that "it is requisite that all law with respect to boroughs should be clear and distinct," it would no doubt have been a much more simple rule to have held, according to the charter, that the notorious fact of non-residence should put an end to the office, rather than that it should depend upon the will of the corporation whether they would remove the person or not: he in the meantime continuing in office contrary to the spirit of the king's grant; and therefore it seems that the latter doctrine would be much more productive of

* See before.

confusion and uncertainty than that which was to depend ^{George III.} upon the overt act of non-residence. Nor does the analogy ^{Bedford.} between fines void or voidable appear to apply to a case of this description, which relates to *public* and not private rights. And if the consequence of a rule of law is to be considered, it should be remembered that under this class of cases, numerous instances have since arisen in all parts of the kingdom, where non-resident officers of corporations, not being removed by their fellow corporators, who are themselves also often non-resident, have continued in their offices in defiance of the charters: the courts of law not being in any degree ancillary to their removal, and no remedy, in fact, existing for the mischief. The Chief Justice said that Lord Holt, as a lawyer of the greatest eminence, gave great authority to the opinion he had declared, "*Amicus Plato, sed magis amica veritas*;" and as to there being no contrary decision, it would seem to require no authority to establish the position, that if a charter required a corporate officer to be resident, and provided that if he left the borough his place should be vacant, and it should be filled up by another, that his ceasing to be a resident should put an end to the office.

In fact, on a subsequent occasion, in the case of the King against the commissioners under the *Brighton* paving act, 50 Geo. III., ch. 38, the court so determined: by holding that where the act provided that, on the removal of a commissioner out of the parish, the other commissioners should cause notice to be given to the inhabitants for electing another in his stead; upon a commissioner removing out of the parish, and occupying no house there, but only coming to the place as an occasional visitor, the office was held to be actually void.

LEICESTER.

A return to a mandamus to restore an alderman of Leicester, removed for *non-residence*,* was disallowed, because it did not set forth a *total desertion* from the place of which the party was alderman. 1767.

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George III.

1774.

PORTSMOUTH.

In the case of *Rex v. Carter*,* the question was whether the defendant, being elected at the age of five years old, a burgess of Portsmouth, and sworn in at 21, was duly elected according to the terms of the charter of the third of Charles I. *Lord Mansfield*.—"There is no more in the case than this, that the king has given them a power to choose and swear in burgesses; and the question is, whether he gave them a power to grant an *inchoate right*, when no oath could be administered to them. I am clearly of opinion no such power is given by the charter."

LONDON.

1791. Pursuing the doctrine of non-residence—in the celebrated case of the citizens of London against the corporation of Lynn, it was holden in the Common Pleas that "the freemen of the city of London had a right to be exempt from the payment of all tolls and port duties throughout all England (except prises of wine) in whatever place they reside." With respect to which it was forcibly observed by Mr. Justice Buller, in giving judgment in error, in the King's Bench,† that "it had been contended by the counsel for the city,‡ that the word, '*citizens*,' included all the free-men, whether resident or not:—if it did, such a custom could not exist in point of law.§ If such a custom could be supported, it might be attended with the most serious consequences; since it would be in the power of the city of London, which is one of the oldest corporations in the kingdom, to sell the privileges of every other."

Mr. Justice Grove also, at the termination of his judgment in the same case, said, "I believe it has been decided, that the word '*citizens*,' *ex vi termini*, means *resident citizens*. However, I do not wish to give any decided opinion on this point."

And in a subsequent case, of the Corporation of London *v.*

* Cowp. p. 220.

† 1 Black. 206.

‡ 4 T. R. 125.

§ Robinson v. Marshall, 3 Bulstr. 1. Thoms. Ent. 302, 30 Edwd. III. fo. 16.

the Corporation of Liverpool, which was tried at bar, in the George III. Court of Exchequer, in Easter term, 1799, the jury, under the direction of the court, found that "a *freeman* is not exempt from toll, unless he be a *resident inhabitant*, and in *scot and lot*."

SEAFORD.

Notwithstanding the difficulty which the Court of King's Bench appeared to have felt in the case of the King and Heaven, as to fixing the time when non-residence began, no difficulty was found in the following case, in fixing the period when residence commenced;—in fact they are correlative terms; for the commencing a residence in a new place, generally fixes the period of ceasing to reside in a former. Thus a person in Seaford,* having *prior connexions* with that borough, previous to his election to the *office of bailiff*, for which *residence is a necessary qualification*, took a house at first for four years, but afterwards, at his landlord's request, for one, and *slept there one night before the election*, and did not return again for near a month afterwards, when he stayed two days, but retained possession of his house, under his lease, the whole time;—the taking of the house appearing to the court to be *bona fide*, that was held a sufficient *legal residence* to satisfy the qualification required.

1793.

But afterwards an information in nature of *quo warranto* was granted, in order to try whether a *residence* in the same *Residence.* borough of Seaford, *previous* to an election, *which requires residence, were bona fide or not*—it appearing that the defendant, though *in treaty* for a house in the borough, had only hired *lodgings* there, and had resided a very few nights in his journey to and from other places.†

CARMARTHEN.

The two following cases were also decided in this reign on the point of residence.‡

1813.

A charter which required that the *mayor* should be an

* The King v. John Sargent, T. R., 466.

† The King v. the Duke of Richmond, 6 T. R. 560.

‡ The King v. G. Williams, 2 Maule & Selwyn, p. 141.

George III. porter) *was not a judicial authority*. But the parties themselves referred the question to Lord Holt, a lawyer of the greatest eminence, and as far as a point can derive authority from any one person, the opinion of Lord Holt upon this subject has great weight; and he thought, that the office of common councilman did not become ipso facto vacant by non-residence, and that the party did not lose his franchise till a sentence of amotion by the corporation had been pronounced. Therefore, I am of opinion, on reason, on analogy, and on the case cited, (there being no contrary decision,) that there must be a judgment of amotion against this defendant by the corporation of Bedford, for non-residence, before we can interpose by granting an information in nature of a quo warranto against him."

The argument of *convenience* insisted upon by the Chief Justice seems to be questionable. Certainly that part which assumes the difficulty of ascertaining when the residence would cease seems to be untenable, as residence and non-residence, a point so necessary to be established, and in so many instances determined in practice, upon cases of settlement, constables, magistrates, coroners, sheriffs, clergy, &c. Nor was it any greater hardship that those who had derivative titles under persons so circumstanced, should lose their offices any more than on any other ground. But, on the contrary, it would seem a less hardship, because his non-residence must have been notorious; and all who took under him must be assumed to have had knowledge of the fact. According to the principles before quoted from Lord Mansfield,* that "it is requisite that all law with respect to bo-
"roughs should be clear and distinct," it would no doubt have been a much more simple rule to have held, according to the charter, that the notorious fact of non-residence should put an end to the office, rather than that it should depend upon the will of the corporation whether they would remove the person or not: he in the meantime continuing in office contrary to the spirit of the king's grant; and therefore it seems that the latter doctrine would be much more productive of

* See before.

confusion and uncertainty than that which was to depend ^{George III.} upon the overt act of non-residence. Nor does the analogy ^{Bedford.} between fines void or voidable appear to apply to a case of this description, which relates to *public* and not private rights. And if the consequence of a rule of law is to be considered, it should be remembered that under this class of cases, numerous instances have since arisen in all parts of the kingdom, where non-resident officers of corporations, not being removed by their fellow corporators, who are themselves also often non-resident, have continued in their offices in defiance of the charters: the courts of law not being in any degree ancillary to their removal, and no remedy, in fact, existing for the mischief. The Chief Justice said that Lord Holt, as a lawyer of the greatest eminence, gave great authority to the opinion he had declared, "*Amicus Plato, sed magis amica veritas*;" and as to there being no contrary decision, it would seem to require no authority to establish the position, that if a charter required a corporate officer to be resident, and provided that if he left the borough his place should be vacant, and it should be filled up by another, that his ceasing to be a resident should put an end to the office.

In fact, on a subsequent occasion, in the case of the King against the commissioners under the *Brighton* paving act, 50 Geo. III., ch. 38, the court so determined: by holding that where the act provided that, on the removal of a commissioner out of the parish, the other commissioners should cause notice to be given to the inhabitants for electing another in his stead; upon a commissioner removing out of the parish, and occupying no house there, but only coming to the place as an occasional visitor, the office was held to be actually void.

LEICESTER.

A return to a mandamus to restore an alderman of Leicester, removed for *non-residence*,* was disallowed, because it did not set forth a *total desertion* from the place of which the party was alderman. 1767.

* *Rex v. Mayor and Aldermen of Leicester*, 4 Bur. 2087.

George III.

1774.

PORTSMOUTH.

In the case of *Rex v. Carter*,* the question was whether the defendant, being elected at the age of five years old, a burgess of Portsmouth, and sworn in at 21, was duly elected according to the terms of the charter of the third of Charles I. *Lord Mansfield*.—"There is no more in the case than this, that the king has given them a power to choose and swear in burgesses; and the question is, whether he gave them a power to grant an *inchoate right*, when no oath could be administered to them. I am clearly of opinion no such power is given by the charter."

LONDON.

1791. Pursuing the doctrine of non-residence—in the celebrated case of the citizens of London against the corporation of Lynn, it was holden in the Common Pleas that "the freemen of the city of London had a right to be exempt from the payment of all tolls and port duties throughout all England (except prises of wine) in whatever place they reside." With respect to which it was forcibly observed by Mr. Justice Buller, in giving judgment in error, in the King's Bench,† that "it had been contended by the counsel for the city,‡ that the word, '*citizens*,' included all the free-men, whether resident or not:—if it did, such a custom could not exist in point of law.§ If such a custom could be supported, it might be attended with the most serious consequences; since it would be in the power of the city of London, which is one of the oldest corporations in the kingdom, to sell the privileges of every other."

Mr. Justice Grove also, at the termination of his judgment in the same case, said, "I believe it has been decided, that the word '*citizens*,' ex vi termini, means *resident citizens*. However, I do not wish to give any decided opinion on this point."

And in a subsequent case, of the Corporation of London v.

* Cowp. p. 220.

† 1 Black. 206.

‡ 4 T. R. 125.

§ Robinson v. Marshall, 3 Bulstr. 1. Thoms. Ent. 302, 30 Edwd. 111. fo. 16.

the Corporation of Liverpool, which was tried at bar, in the George III. Court of Exchequer, in Easter term, 1799, the jury, under the direction of the court, found that "a *freeman* is not exempt from toll, unless he be a *resident inhabitant*, and in *scot and lot*."

SEAFORD.

Notwithstanding the difficulty which the Court of King's Bench appeared to have felt in the case of the King and Heaven, as to fixing the time when non-residence began, no difficulty was found in the following case, in fixing the period when residence commenced;—in fact they are correlative terms; for the commencing a residence in a new place, generally fixes the period of ceasing to reside in a former. Thus a person in Seaford,* having *prior connexions* with that borough, previous to his election to the *office of bailiff*, for which *residence is a necessary qualification*, took a house at first for four years, but afterwards, at his landlord's request, for one, and *slept there one night before the election*, and did not return again for near a month afterwards, when he stayed two days, but retained possession of his house, under his lease, the whole time;—the taking of the house appearing to the court to be *bona fide*, that was held a sufficient *legal residence* to satisfy the qualification required. 1793.

But afterwards an information in nature of *quo warranto* was granted, in order to try whether a *residence* in the same *Residence.* borough of Seaford, *previous* to an election, *which requires residence, were bona fide or not*—it appearing that the defendant, though *in treaty* for a house in the borough, had only hired *lodgings* there, and had resided a very few nights in his journey to and from other places.†

CARMARTHEN.

The two following cases were also decided in this reign 1813.
on the point of residence.‡

A charter which required that the *mayor* should be an

* The King v. John Sargent, T. R., 466.

† The King v. the Duke of Richmond, 6 T. R. 560.

‡ The King v. G. Williams, 2 Maule & Selwyn, p. 141.

George III. *inhabitant resiant* within the borough, on pain of forfeiting
Resiant. such sum as should be imposed by the mayor, recorder, and major part of the common council, not exceeding 100*l.*, does not require *resiancy* as a qualification for holding the office, but under a penalty.

LIVERPOOL.

1814. By charter 7 William III., the mayor of *Liverpool** is appointed to be elected out of 41 *common councilmen*, and every
Residence. mayor is made an *alderman*; and it is granted “quod quandocunque acciderit aliquem majorem, &c. aut aliquem vel aliquos de ballivis, vel de communi concillio villæ prædictæ pro tempore existente obire, seu ab officio suo, vel ab officiis suis amoveri, vel decedere, sive stare recusare, quod tunc et in quolibet tali casu, alia idonea persona, vel alia idoneæ, personæ, de tempore in tempus, ad et in officium illius, vel ad et in officia illorum sic amotorum, vel obeuntium sive stare recusantium eligetur,” &c.; and by subsequent charters every alderman is appointed justice for the town. It was held, that the defendant, who was a common councilman, and had once served the *office of mayor*, and acted as *justice* for the town, but had since *quitted it*, and *resided four miles distant*, having only a bank there, and was an *acting magistrate for the county*, was not entitled to refuse to stand at a subsequent election as mayor, though the serving that office would compel him to remove his residence to the town, and prevent his acting as magistrate for the county; and therefore *the court granted a mandamus to him to take upon himself the office*, he having been elected at such subsequent meeting.

CHESTER.

1786. The case of the *King v. Amery*, in the 26th of George III., from the city of Chester,† affords a striking demonstration how strong the general impression was, that the existence of *corporations by prescription could not be disputed*. Lord Mansfield saying, “all questions concerning trials at bar

* The *King v. Leyland*, 3 Maule & Selwyn, 114.

† The *King v. Amery*, 1 T. R. 367.

must depend upon their own circumstances. Many infor-
 mations in the nature of a quo warranto, upon which the
 existence of corporations depended, have been tried at
 nisi prius, and many at bar. The only rule therefore to go
 by is, the judgment which the court shall form on the nature
 of the issues, and their dependencies. Now, *it seems to me*
as clear as possible, that no question of magnitude can arise
 in this case to render a trial at the bar of this court neces-
 sary. *Many of the issues will admit of no objection, such as,*
that it is a corporation by prescription; and the granting, in
 fact, of the charter by Car. II., and some others, are only
 consequential. The great question is, on the acceptance of
 the charter of Car. II., but that cannot involve in it much
 difficulty. *We know the obloquy which charters granted at*
that time lie under. As my Lord Hardwick said, ‘they
 ‘have never received any countenance in Westminster Hall;
 ‘and he would never give any opinion in support of them;
 ‘unless the strongest evidence was laid before the court of
 ‘their having been accepted, and uniformly acted under;’
 therefore there is no ground in this case for a trial at bar.”

George III.
 Chester.

Prescrip-
 tion.

Charters
 of
 Charles II.

This place affords another instance, in addition to those
 already shown in the history of so many boroughs, where
 even the parties which have contested the right of the select
 body of the corporation to control the municipal and parlia-
 mentary elections, have themselves assumed, without suffi-
 cient grounds, the existence of a corporation from time
 immemorial—the foundation upon which the greater portion
 of the errors on this subject are founded—and affording too
 great facility for the support of the corporate usurpations.

For if they really existed before the time of legal memory,
 it might be very difficult to prove that the citizens and bur-
 gesses who returned members to Parliament after that period,
 were not members of those bodies: the records of the early
 periods of parliamentary representation, being so scanty as
 not to afford a decisive negative to that supposition. And,
 therefore, if the question stood on these grounds alone, it
 would probably be decided in favour of the corporate right.
 But if, on the contrary, it can be shown that no municipal

Corpora-
 tions.

George III. corporations existed before the time of legal memory, nor
Chester. till long after; but that burgesses existed in this country from the earliest times; and were connected with the common law, and the system of police which at that time existed; that the present corporations can be distinctly traced, both by general history, and the records of each particular borough, to have been first created long since the time of legal memory; then the question would indeed stand on very different grounds. The modern usage and practice would be attributed, as they justly ought, to usurpation; and their encroachments would be sanctioned with caution.

Burgesses. Whilst, on the other hand, the early existence of *burgesses* being established, and that they included all the *free inhabitant householders* within the limits of each borough, according to the general principle of the law, their claim would be received with a predisposition to support it.

To assume, therefore, the existence of prescriptive corporations abandons the strongest grounds for the establishment of the right of the inhabitant householders,* and unjustifiably concedes to the corporate right the strongest basis for its support.

Thus, in this case Lord Mansfield adopts the position of
Chester. Chester being a corporation by prescription as incontrovertible; and in the elaborate report of the great case connected with Chester, the same doctrine is assumed by the author, who nevertheless published his work and tried the cause, to negative the right of the select body.

That author also errs in his conjecture as to the origin of
Companies companies, which he rests on hypothesis, instead of adverting to the facts disclosed by history. The first *companies* in this country, it is clear from the instances stated by *Madox*, were religious associations; from which other companies afterwards sprung for the purposes of trade, and both the one and the other were distinct from the institution of boroughs and burgesses.

Aldermen. The assertion that *aldermen* arose out of these companies

* See Report of the proceedings in informations upon quo warranto, in the case of the King v. Amery and Monk, 2 vols. 4to. Chester, 1791.

is also inaccurate. The *ealdorman* was originally, under our ^{George III.} Saxon government, the principal legal officer in each shire. ^{Chester.} An officer of the same description existed in each *burgh*, ^{Burgh.} which was a limited district carved out of the county: and where the boroughs were very large, and such a subdivision was necessary, there was an alderman presiding over each *ward* of the borough, as in London, Canterbury, Ipswich, &c. ^{Ward.} But it was many centuries after the first use of the term, as applied to the chief officer of the town or ward—whose duty it was to superintend the execution of all the duties connected with the leet—that it obtained the modern application to an officer chosen by a corporation for life.

So also the hypothesis that the mayor arose out of the trading companies is inaccurate; as the documents which have been quoted abundantly establish. ^{Mayor.}

A more correct view of the history of Chester might be collected from a recollection of the circumstances already stated with respect to it—as the entry in Domesday. The charters and confirmation of Henry VI., King John, Henry III., Edward I., Edward III., Henry V., none of them charters of incorporation. The entries of freemen at the *portmote* court, in the time of Henry VI. Its separation from the shire of Chester, in the reign of Henry VII. The regulation by statute of the shire days, in the reign of Henry VIII.; and the admissions of freemen in the same reign, with the first mention of it as a corporation, in the reign of Queen Elizabeth.*

From these documents it will be seen, that the select body first began its usurpations in the reign of Queen Elizabeth; and the further progress of them may be collected from its subsequent municipal and parliamentary history.

The charters and privileges of Chester, were like those of many other places, seized in the reign of Charles II., and restored by the proclamation of James II. After which; in the second of William and Mary, a report was made ^{1690.} upon *petitions* against the return of the members to Parliament, in which it was said that the right of election was in

* Vide Index, title *Chester*.

George III. the *freemen*,* the irregularities in making whom, were proved
 Chester. by the petitioners :—as that 125 *were made free after the teste*
 1690. *of the writ.*

Another witness proved he was present when the *new freemen were made*, and took notice of it to the petitioners, and advised them to get some made for them; but they refused it, upon *the case of Dartmouth*; that *several masters complained their apprentices were made free, contrary to their knowledge.*

For the sitting members, it was said by a witness, that he had known all the elections since 1660;† and that *a son of a freeman might demand his freedom at 16*; and an *apprentice* has a right if he comes out of his time before he is 21 years of age.

Mr. Skelham said, he was mayor at the time of the election; and had also known the several elections since 1660; and never knew any freeman of Chester, young or old, rich or poor, denied his vote; that those who were *made free*, claimed either by *birth or servitude*: that none were ever put by who were capable of taking an oath.

Upon the whole the committee resolved against the petitioners.

The right having been thus *agreed* to be in the freemen, the system of outnumbering the resident citizens, by the foreign freemen, appears to have been acted upon; and the usurpations of the mayor and the select body, may also be collected from the following petition of Sir John Mainwaring, and Mr. Chitchley, aldermen of Chester, on the behalf of themselves and other aldermen and citizens, to the king—

“Humbly sheweth,

“That about the 15th of July last, your petitioners preferred

* This cannot be the right of election, unless “*freemen*” mean *inhabitants*, for to them the statute of Henry VIII. gives the right. And it is clear that the usurpation in this borough must have commenced since 1543, the date of the statute. See statute 25 Car. II., 1673, for Durham, which gives the right expressly to the freemen.

† It is worthy of remark, that almost all the usages which were relied upon in these parliamentary cases, were those which commenced immediately after the Restoration.

their humble petition to this most honourable board—setting George III.
1690. forth the arbitrary and undue proceedings of Peter Bennett, late mayor of Chester, viz.: by waiving the fixed time, by order of assembly, for the choosing of common councilmen.

“That, upon reading the petition, their excellencies, in council, were pleased to order the late mayor to attend the board, in person, and to put in his answer in writing.

“That the late mayor of Chester put in his answer accordingly, and that the mayor and your petitioners are in town, and ready to have the cause heard.

“That their excellencies did, by their order, recommend to the care and circumspection of Peter Bennett, the mayor and magistrates of the city of Chester, the preventing, as much as in them lay, all such tumultuous proceedings whereby the peace of the city might any ways be disturbed.

“That, notwithstanding the order, the said P. Bennett hath since caused five aldermen to be elected by an order of assembly, contrary to the express words of the charter, and did thereby *exclude the freemen, their votes*, who ought to have been the electors, and did greatly endanger the peace of the city by such illegal election.

“That the common councilmen are to be chosen yearly; and that P. Bennett suffered the year to elapse before he went to the election of the common councilmen, by reason whereof 400 persons absented themselves, and would not attend to give their votes, lest they should seem to countenance a certain breach of their charter.

“That, by reason of the freemen absenting themselves, the said P. Bennett, and his accomplices, took the opportunity of turning out 32 of the old common councilmen, who all of them had subscribed the voluntary association, and were hearty and zealous to the government,—putting in their stead men who refused to sign the association, and may reasonably be suspected for their loyalty, two of them particularly, Will. Francis and Humpy. Page, standing conviction and indictment of high misdemeanour, for drinking the late King James’s, and the pretended Prince of Wales’, their healths, with swords drawn, and have been both fined

George III. for the same ; yet, are they both thought so meritorious by
 1690. the said Peter Bennett, that they were chosen common councilmen ; and Francis is thought fit, and presides as sheriff.

“That as the new common councilmen are the creatures of the said Peter Bennett, so have they gratefully expressed themselves to be such, having joined with some aldermen of like principles ; and have, by order of their assembly, and by a bond, sealed, with the common seal of the city, obliged themselves and the city, to repay the said Peter Bennett all charges he shall be put to in the defence of his illegal and arbitrary proceedings.

“That by means of which security so given, 'tis conceived the treasure of the city is in great danger of being extravagantly expended ; your petitioners, and all the freemen, are highly discouraged, if not, by your great wisdom, this evil, together with the rest of the breaches of our charter complained of, are not speedily redressed.

“May it therefore please your most excellent majesty, and this most honourable board, that Peter Bennett may answer to the several complaints of this petition.”

The struggle for the right of the non-resident freemen was
 1747. afterwards continued ; and in the 21st year of George II., a petition, complaining of an undue election, was heard. The dispute was as to the right of election, which, by the *petitioners*, was stated to be only “in such *citizens* as were “*inhabitants* within the city, or the liberties, and admitted “to their freedom by birth or servitude ;” whereas by the sitting member the right was stated to be in the *freemen in general*.

The original charter granted to the city by King Henry VII., and the confirmation by Queen Elizabeth, were produced to prove, that the right of electing the mayor, and
 Commorant. several other officers, was vested in the citizens *commorant* within the city ; and that *commorant* citizens only were eligible into those offices.

A witness was examined in order to prove that, anciently, such citizens only had enjoyed the right to vote in the

election of citizens to serve in Parliament for the city, as ^{George III.} were entitled to their freedom by *birth or servitude*.

Another witness was examined in order to prove that the right was in such citizens only as were *inhabitants* within the city or liberties, and admitted to their freedom by *birth or servitude*, &c. <sup>Birth.
Servitude.
Inhabitants</sup>

On the other hand, the *sitting member* showed, from the resolutions of the House, so far back as the second Wm. & Mary, that other freemen had voted at elections; and having produced several polls taken at elections of members of Parliament for the city, he proposed to prove that many of the persons who voted at each of the elections, were not *commorant* in the city when they voted; but the same was admitted by the petitioners. Then he proposed to prove, —1st. That several *honorary* and *non-resident* freemen had been elected into the offices of mayor and sheriff. 2nd. That honorary freemen had exercised *trades* within the city. 3rd. The freemen who had purchased their freedoms, were exempted from toll, as well as other freemen. But the whole was admitted by the petitioners. <sup>Honorary
freemen.</sup>

The question was put and carried, “that the right was in “ the mayor, aldermen, and common council, and in such of “ the *freemen* as should have been *commorant* within the said “ city, or the liberties, for the space of *one whole year* next “ before the election.” ^{Right.}

Upon a motion for an information* in the nature of a quo warranto against some of the officers of the city, among other things it appeared, that by a charter granted the 16th year of Charles II., the right of election of corporation officers was vested in the mayor, aldermen, and *commonalty at large*; the defendants were elected by part of the corporation, exclusive of the commonalty, and a *usage* was set up to justify such election. ^{1733.}

The court held clearly, that *no usage* could control the direction of a charter of so modern a date; and ^{Usage.}

Lord Hardwick, Chief Justice, mentioned the case of the corporation of *Brecknock*, where the charter was granted in

* The King v. Sir Robert Grosvenor and others, 7 Mod. 196.

George III. 1783. the reign of Philip and Mary; and directed the corporation officers to be chosen *de inhabitantibus*; and a usage had prevailed from the 15th of Queen Elizabeth, to elect them without any regard to *inhabitancy* to that time; and upon a special verdict, it was held in this court, "*that such usage in contradiction to the charter, was void,*"* and that judgment, upon a writ of error, was affirmed in the House of Lords. It was also agreed in this case, that by a judgment upon an information in the nature of a *quo warranto*, the corporation itself cannot be dissolved, but only the particular abused privileges seized into the hands of the crown.

Upon a rule to show cause why an *information* should not be granted against the mayor, aldermen and common council of the city of Chester,† to show by what authority they claimed to elect aldermen, exclusive of the freemen at large; and likewise upon four other rules to show cause why an information should not be granted against the mayor, and three of the aldermen of Chester, for exercising their offices; the nature of the case appeared to be, that by a charter made in the 16th Charles II., power was given to the *freemen at large*, of joining with the aldermen and common council, in the elections of aldermen in this city. This charter was acted under, till the 36th year of that king, and then on a *quo warranto* brought against this corporation, judgment was given, that all their liberties should be *seised*, and the *corporation dissolved*. The year following, a new charter was granted to them, vesting this right of election in the aldermen and common council, exclusive of the freemen at large, and the king thereby reserved to *himself*, a power of *removing them at pleasure*.

The freemen, however, made some opposition to the acceptance of this charter. In the beginning of King *James II.*'s time, the judgment of seizure was pardoned, and they had full restitution of their liberties. In the fourth of *James II.*, there was another charter granted to them, vesting the right

* Litt., sec. 212—*Malus usus abolendus*. Co. Litt. ib. *Quia in consuetudinibus non diuturnitas temporis, sed soliditas est consideranda*.

† The King v. Sir W. W. Wynn, and others, 2 Barnardiston, 390.

of election in the aldermen and common council only, and in ^{George III.} *that charter, the king reserved to himself a power, not only of removing them at pleasure, but of appointing new ones in their room.** 1733.

There was some opposition made by the freemen to this charter likewise; which continued to the year 1698, but from that time, they acquiesced under the election made by the others.

Upon this state of the case, *Mr. Strange* and others of counsel for the defendants, submitted, that the rule ought to be discharged. They said they did agree, that neither the charter of 37th Charles II., nor that of the fourth of James II., could bind the freemen, unless the freemen accepted it; but they submitted, that a long acquiescence would be an evidence of such acceptance. An acquiescence there was in the present case for 35 years last past; and they apprehended that the court would not grant an information now, which would overturn the whole state of the corporation.

They cited the case of *Taunton*, in which an information was moved for, against certain members of the corporation for not having taken the solemn league and covenant, in pursuance of a clause in an act of Parliament. It was argued by the defendant's counsel in that case, that if such information should be granted on that account, it would affect the election of most of the officers in England. That argument had a considerable influence with the court. The rule for showing cause was never made absolute, and whilst it was depending, the clause in the act of Parliament was repealed. For the like purpose they cited the case in *Skin.* 574.

Mr. Abney and others were of counsel on the side of the rule. They conceived that the *judgment of seisure* in 36 Car. II., was entirely illegal. If the corporation had forfeited the charter, the only method of taking advantage of the for-

* The proclamation of James II., in the fourth year of his reign, for restoring corporations to their ancient charters, &c., operates (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Charles II., (but which surrenders were not enrolled,) and where new charters had been obtained, overturns such new charters.—*Newling v. Francis*, 3 T. R. 169. 1688.

George III. feiture, was by scire facias to repeal it ; and no such judgment can be in quo warranto. For this purpose they mentioned the case in 4 Mod. 52.

1733.

But if the judgment had been legal, the restitution in James II. had entirely taken off the force of it. Then with regard to the powers reserved to the crown by the charters of 37 Charles II. and 4 James II., they said they were of a very extraordinary nature, and such as made the charters to be void and not capable of being accepted. But they submitted, that in fact there was no acceptance ; on the contrary there was an express opposition, and the submission to it for 35 years last past, they conceived would not amount to an acceptance. For this purpose, *Mr. Hollins* mentioned a case that 22 years would not.

The *Chief Justice* declared his opinion to be, that the judgment of seizure was not according to law ; and with regard to the two last charters, he observed, that the powers reserved in them could hardly be warranted, and he never knew these sort of charters in King Charles II's and King James II's time mentioned by the judges but with censure. By the charter of 16 Charles II. the freemen at large had undoubtedly a right in joining in these elections. And he did not think that the acquiescence to the contrary by the freemen for 35 years together, would make any difference. In the case of Brecknock, there was a charter granted in the reign of Philip and Mary, which settled the election in one way ; from 15th Elizabeth there had been an invariable usage in another. This matter was found by special verdict. Yet this court was of opinion that the usage ought not to prevail ; and accordingly gave judgment in the quo warranto against the defendants. On that judgment, a writ of error was brought in the House of Lords, and it was affirmed. The least thing that the court could do in this case, was to permit this matter to be tried. The rest of the court were of the same opinion ; accordingly the rule was made absolute.

Charters.
Charles II.

Usage.

1753. An act passed in this year, relative to the election of the mayor and other officers of this city, and which, amongst other things, changed the day of election from the Friday

Chester.

next after the day of St. Dennis, to the Friday next after the George III.
20th of October.

In the 24th year of George III. the important case of the 1784.
King and Amery, relative to Chester, came before the Court
of King's Bench. The affidavits used on the occasion are too
long for insertion, and may be seen in the Chester case.*

The rule for the information was made absolute, and the
question subsequently tried.

The contest between the corporation and the citizens of
Chester, was in substance *whether the old charter granted by*
Henry VII., or the new one of *Charles II.* is to be the law
of that city. After two trials, and a very elaborate argument
of four days' continuance, in the Court of King's Bench, the
points on which the merits of the cause rested, were briefly
as follows, viz.

1. Whether the judgment of seizure against the old corpo-
ration went the length of dissolving that corporation.
2. Whether the power reserved by the charter of Charles
II. warranted the amoval of all the officers acting under it.
3. Whether the charter of restoration could operate to re-
vive the old constitution.

The court, after twelve months' consideration, gave the
following judgment :—

As to the *first point*, if the old corporation were not dis-
solved by the judgment of seizure, the new charter, creating
a distinct body, could not operate; as two corporations, for
similar purposes, cannot subsist in the same place at the
same time. But the contumacy of the old body in not ap-
pearing to the quo warranto, has been said to cause the judg-
ment of seizure to work an extinguishment of their franchises,
and therefore the new charter was legally granted.

As to the *second*, it is said that the power reserved to the
crown in the charter of Charles II. did not warrant the
amoval of all the officers, and therefore did not affect the
existence of that corporation.

And *lastly*, it has been determined that the charter of
restitution could not restore the dissolved body, after the

* 1 T. R. 578; 2 T. R. 515.

George III. acceptance of a new charter, and is therefore null and
1784. void.*

Mr. Baron Eyre, in the course of this case,† observed, as to the charter of Charles II., that *the granting it was a measure of the times*, and which, from *the moment when it became necessary to tread back those steps* in the latter end of the reign of James II., seemed to have been entirely laid aside.

1813. Notwithstanding the case which is before cited, in which *questionable usage* was not allowed to prevail, the Court of King's Bench afterwards refused to grant a mandamus, for the purpose of bringing a usage which had prevailed for a great length of time under discussion. But it will be seen that the decision turned upon the technical ground that the Court will not interpose by the special prerogative writ of mandamus, when any other specific remedy is open to the parties.

The case was thus:‡—A charter of incorporation of Henry VII. granted to the citizens and commonalty in these words: "Quod ipsi et successores sui in perpetuum singulis annis successivis 24 concives civitatis in aldermannos, necnon 40 alios cives ejusdem civitatis pro communi consilio civitatis illius eligere, facere et creare possint;" and it appeared that in the year 1693, and the two following years, successive elections of the 40 common-councilmen had been made, since which time the *usage* had been *not* to elect the aldermen or common councilmen *annually*. The court refused a mandamus, which was applied for in order to raise the question against the usage, whether the elections of those officers ought to be annual;—there being another remedy open to the parties making this application.

1825. Notwithstanding the dictum of Lord Mansfield, in the case of the King v. Amery, that Chester was a corporation by prescription, in the sixth of George IV., at the summer assizes, upon a quo warranto, an issue, whether it was a corpo-

* See Rep. of Trin. Term, 1788, the King against Amery.

† 1 T. R. 578.

‡ The King v. The Mayor and Citizens of Chester, 1 Maule & Selwyn, 101.

ration by prescription, was found by the jury in the negative.* *George III.*
 But the court afterwards granted a new trial. 1825.

This closes the municipal and parliamentary history of Chester.

CASES.—LEET.

The following cases will establish the existence of the *Leet*.
court leet at this period in the several places to which they refer. Thus in an action† for an *amercement in the court leet*, 1789.
 the declaration stated the court to have been holden before the steward of the manor; and the evidence proved it to have been holden before the deputy-steward; it was held to be a material variance.

A custom to swear the jurors at one court leet, in the county of Cumberland, to inquire, and return their presentments at the next court, is bad in law.‡ 1801.
1802.

Information in nature of quo warranto lies for the office of *bailiff* of the *court leet* of Gosport, being a prescriptive office, and having power to summon and select the jury.§ Gosport.

A plea to a quo warranto|| stated, that an immemorial *court leet* for the borough of *Holt*, was in part holden in the morning, and in part in the evening, and that the custom had been to elect the mayor at the morning court, who had been accustomed to be sworn into the office at the evening court, by the *steward* or his deputy. The replication denied the mode of election; and there was also an issue “not duly sworn.” At the trial, it appeared, that in addition to the custom set out in the plea, it had been *usual* for the *leet jury* to present, in writing, the candidate who had most votes at the morning court; but they had no control over the poll. It was *held*, that this was a mere ministerial act, and that it was no essential part of the custom, and need not be stated on the record. 1819.

* And a similar verdict was given as to Stafford—Summer assizes, 1825.

† *Wyvill, clerk v. Shepherd*, 1 W. Black. 162.

‡ *Davidson v. Moscrop*, 2 East, 56.

§ *The King v. Bingham, clerk*, 2 East, 306.

|| *The King v. Rowland*, 3 Barn. & Ald. 130.

HUNTINGDON.

1804. Where a corporation were seised in fee of *lands*,* which by the custom, were annually meted out under their control by a *leet jury*, according to a certain stint, to such of the *resident burgesses*, who chose to stock the same, they paying 19s. 4d. to each of the other burgesses who did not stock; it was *held*, that the burgesses who so stocked, were *tenants in common*† of the lands so occupied by them, and as such occupiers were liable to be rated for the same.

And the court leet minute book of that borough, is extant from 1764 to 1768. The following are specimens of the entries :—

Borough of Huntingdon to wit. At the court leet holden by adjournment, at the court hall, in and for the said borough, on Monday, the 29th day of October, in this year, before William Smith, gentleman, mayor, of the said borough. Leet jury;—14 jurymen.

At this court leet, Henry, *son* of William Dawes; George, son of Goodes and Henry Woodward; Philip, *son* of Philip and Mary Stokes; Richard, *son* of Thomas Beale, and Elizabeth his wife; and William, *son* of James Garner, jun., and Mary his wife, *being all free-born*, were *admitted* and sworn burgesses, took the oaths, &c.

Jury. This book also contains the admission of several burgesses, in a similar way before the leet juries, *all free-born* burgesses.

Leet. But as a proof of the time and method of the usurpation of the common council, and the manner in which the *court leets* have been gradually superseded in modern times, it is but a very short period after the termination of the book above quoted, that the court leet became less frequent, and the admission of burgesses began to take place at the meetings of the common council; though some were still admitted at the court leet, till 1790: from which time the meeting is generally called a Court of Pleas. But in 1810, at the

* The King v. Watson, 5 East, 480.

† See also Rex v. Mayor, Aldermen, and Burgesses of Sudbury, 1 B. & C. 389.

court leet, the *list of the inhabitants* was regularly called George III.
 over, and those who did not answer to their names were 1810.
 fined. And the same list was continued till 1824.

NOTTINGHAM.

The cases of this reign relative to England, may be 1811.
 concluded with that which is by far the most important
 in modern times, with respect to the subject of our
 inquiry.

The real nature and origin of the admission and swearing
 of *freemen* at the *court leet*—the connexion of the right by
birth and *servitude*, with the common law, unconnected with
 any reference to the doctrines or principles of corporations—
 have been already shown.

It only remains to quote the case of the *King and Bird*,*
 which, strange as it may appear, is the first judicial
 decision, sanctioning the arbitrary power of corporations to
 admit freemen.

A *prescriptive* right in the *eldest and youngest sons of every
 burgess born in Nottingham*;* the latter having served a seven
 years' apprenticeship to any trade; and in every person hav-
 ing served a seven years' apprenticeship in Nottingham, to
 any burgess to be admitted burgesses of the town, on attain-
 ing 21, was holden *not to exclude the incidental power arising
 by implication of law to the corporation at large, to secure their
 perpetual succession by voluntary elections of burgesses, ad li-
 bitum*† and this, though it was averred that N. had always
 been, and yet is a populous town, containing numerous *resi-
 dent and trading* burgesses; and that by the *prescriptive
 modes of supply by birth and servitude*, the succession of a
 sufficient and large number of burgesses is fully secured. For
non constat that these sources had at all times been sufficient
 during the existence of the corporation, without occasional
 supplies of burgesses by election: or even that they were
 so at the time of the defendants. And they could not have
 operated at all, for some years after the creation of the cor-
 poration; and therefore no presumption can be made from

* The King v. Bird, 13 East, 367.

† See before, 1970.

George III. thence, that the crown meant to exclude *the incidental power*
 1811. of the corporation to make voluntary elections of burgesses, in aid of such prescriptive modes of supply.

It was also directed, that whether the power of making such voluntary elections, be incidental to the corporation at large, or exist in them by prescription, it is *competent for them to delegate it to a select part of themselves.*

But they cannot delegate such power to any *stranger.* And the *recorder* of the town must be taken to be such, if he be not stated to be a burgess.

Also, as such select body is the creature of the corporation, its constitution and mode of acting, may, it seems, be modelled (with the exception before stated,) according to the pleasure of its maker; and where the corporation (consisting primarily of the mayor and burgesses, who were directed by charter to elect aldermen from among themselves,) *transferred the right of electing burgesses to a select body,* consisting of the mayor and aldermen, of whom the major part must attend; 18 *livery or clothing burgesses,* of whom nine were sufficient to attend, together with the recorder, if a burgess, and choosing to attend, and six of the burgesses at large, if they choose to attend; but the select body might proceed without either the six burgesses or the recorder, if they did not attend: held that this was a *reasonable and valid bye-law.*

For this decision, there appears to have been no previous authority, and none was attempted to be cited by the learned counsel, who argued it, but one, which was the case of the corporation of Launceston,* in the eighth of Charles I.; and which clearly did not apply to the subject in discussion. For that case only decided, that—if the king creates a corporation of a mayor and eight aldermen, providing that upon the death, or amotion of any alderman, it should be lawful for the mayor and aldermen within the next eight days, to elect another, though there should be no election within the eight days, yet they might elect an alderman at any time afterwards;—for they have a power to elect another, as incident to a corpora-

* 1 Roll. Abr. 115.

tion; and anciently corporations had no such power given to ^{George III.} them. And the affirmative power does not toll the implied ^{1811.} power incident to the corporation.

The principle upon which that case was decided is obvious. The king having directed that there should be perpetually eight aldermen; and having provided for a re-election upon vacancies; must be intended to have impliedly granted the power of making elections to fill those vacancies: for otherwise his charter could not be carried into effect. And the direction that it should be done within eight days, is not inconsistent, though not fulfilled, with the general power to do it afterwards. But where there is no such necessity, that case does not apply. And it was properly urged by the counsel opposed to this claim of right, that the corporation thereby took upon themselves to add a foreign body of their own election, in derogation of the influence and interest of the local inhabitants, whom the crown meant to favour.

The noble lord who decided that case, justly stated at the commencement of his judgment, that if the modes of supplying burgesses appointed by the crown were in fair construction, competent to keep the body alive in the manner intended, he should not be inclined voluntarily to adopt another method to effectuate that purpose.

The learned judge seems therefore to have felt in his mind, that this was in effect making a new charter for the borough; or at least adding to the one which already existed; neither of which could be done by any but the king.

The court, however, justified it upon the plea of *necessity*. But such an act could not be justified even upon that ground. However, if that principle were allowed, it would in this case be answered by showing that no such necessity existed.

The charter of Henry VI. being in truth an incorporation of all the *inhabitants* of free condition, by birth or servitude; or otherwise, there could be no deficiency in the burgesses as long as there were any *inhabitants* in the place. And as soon as there ceased to be any inhabitants there, the franchise granted should cease also; as has been instanced in the cases of Gatton and Sarum.

George III.

1811. The assumed necessity, therefore, could never exist. And the practice of election was, as stated by the learned judge, "a usage of so modern a date, as not to influence the decision of the court." It was 200 years.

The learned judge also accurately stated, quoting from Rolle's Abridgment, that "ancient charters had not any such clause, giving a power to elect;" which is easily explained by the general law having provided for the natural succession of the inhabitants through the presentments by the jury at the court leet.

But the learned judge appears to have assumed, as admitted in the argument, that which at least is not apparent upon the face of the report, that when no mode was provided for continuing the succession, a corporation had a right of necessity to make burgesses by election. But for the reason given before, both the principle and the fact should be denied.

It was also too readily assumed, that there was no provision affording a supply of burgesses, because they would always be found as long as the franchise ought to continue; and the case was decided upon the technical grounds, that the replication did not state as a fact, that the sources of birth and servitude were competent to produce a sufficient supply at all times.

It was also assumed, contrary to the principles of the common law, that there was no mode of compelling persons to come in and be admitted. But the law was too wise and too strong to be so helpless, because, by the rule of the court leet, every *resiant of free condition*, was, by law, *compellable* to be *sworn, admitted, and enrolled*: and the dissolution of the corporation, therefore, was not to be apprehended as long as it could be kept alive for any useful purpose.

But this suggested inconvenience of a want of power to compel the parties to take upon themselves the new character, would apply to those who were voluntarily elected; and therefore this new principle was a bad substitute for the more effectual rules of the ancient law.

In fact, the decision proceeded altogether upon a disregard

of the real history of the municipal bodies; and, therefore, ^{George III.} it is not surprising that a new position of a general incidental right of election, should have been inconsiderately adopted, and the case, from overlooking the simple principles of the common law, should have been involved in the intricacies with which it is surrounded. Nor should the remarks upon this case be closed without observing, that the supposed rights, by *birth* and *servitude*, were attributed to prescription, which pre-supposes a charter to that effect. But no charter, referring to such rights is any where to be discovered. On the contrary, they can be referred to the common law, and be reconciled with it. It is, therefore, one of those instances in which the *dark and uncertain doctrine of prescription* has been resorted to where there is a plainer and more direct ground upon which the rights could be supported. 1811.

IRELAND.—STATUTES.

There are statutes in this reign in some degree affecting the right of election in Ireland, which should be noted.

Thus, in the 35th of George III. c. 29, many of the provisions for the English elections are extended to Ireland: particularly in the 29th section, the substance of the provisions and exceptions in the Durham Act, are embodied:— 1795.
and a system is adopted, which, though varying in some particulars from those of England, according to the particular course and practice in Ireland, is, generally speaking, similar to those in this country, at least as far as our present subject of inquiry is concerned—excepting that it should be observed, that the system of a register was adopted in Ireland before the general Reform Act was passed.

At the Union, in the 40th of George III., the fourth 1800.
article provided, that all questions touching the election of members to Parliament, should be decided in the same manner as questions touching such elections in Great Britain, then were.

A long statute was also passed for regulating the trial of Cap. 106.
controverted elections in Ireland, which directed that all

George III. the regulations on that subject, prescribed by the British
 1795. acts, should extend to all petitions to the united Parliament. And a power was given to issue commissions, if necessary, for the examination of witnesses in Ireland; and this statute was further amended by the 47th George III. c. 14.

Cap. 55. It should be observed, that the same error seems to have been adopted in Ireland, of confounding the counties of cities and towns, with the counties at large—at least as far as related to the freeholders voting.

GEORGE IV.

PARLIAMENTARY CASES.

Petersfield. The *burgesses* of *Petersfield* were described in a resolution
 1820. of this date, in conformity with a resolution of 1727, as being “the freeholders of lands or ancient dwelling-houses, “or shambles built on ancient foundations.”

1821. In the succeeding year, upon a petition of appeal, they were described in the following manner, which certainly does not increase the intelligibility of the description:—“Freeholders of lands and ancient dwelling-houses or shambles, “or dwelling-houses built upon ancient foundations, such “lands, dwelling-houses and shambles not being restricted “to entire ancient tenements.”

1821. There was also a petition of appeal against the determination, as to the borough of *Portsmouth*,* which had given the
 Portsmouth.

* And in the King's Bench, it was held, that as the charter did not expressly require the members of the corporation to be resident, the court would not grant a *mandamus*, commanding the corporation to meet and consider the propriety of removing from their offices non-resident corporators, unless their absence has been productive of some serious inconvenience; and it was said, that an alderman was not bound to reside within the borough unless it was necessary to the duties of his office, or required by the charter. Although in the *Exeter* case it was said to be incidental to his office, &c. *Rex v. Glyde*.—The *King v. the Mayor and Aldermen of the Borough of Portsmouth*, 3 B. & C. 152.

right to the burgesses, including the *non-residents*, as well as the residents, notwithstanding the charter incorporated the “inhabitants.” There was a population of 50,000: and the effect of the decision was to limit the right to about 50 persons, the greater portion of whom were *non-residents*. George IV.
Non-resi-
dence.

The committee, upon the appeal, confirmed that decision.

Five years afterwards, notwithstanding the entry in Domesday, which describes the persons entitled to the privileges, and bound to perform the services incumbent upon the barons of Dover, as “*assidue manentes in villâ*,” and notwithstanding the numerous documents we have quoted, which show that *residence* was necessary for the barons of that place, nevertheless it was decided that they might be *non-resident*.* Dover.
1826.

Non-resi-
dence.

In a previous reign† we have referred to a decision respecting the burgesses of *Calne*, and have promised a recurrence to its history. It is too peculiar to be passed over: particularly as an extraordinary decision respecting the burgesses, again occurred in the present reign. Calne.

It is one of the most ancient boroughs in the kingdom; being mentioned as *Terra Regis*, in Domesday, together with its *burgesses*, and as having existed in the time of Edward the Confessor;‡ It is a curious fact, that the nearly equal division of the property at that time, between the lay and ecclesiastical owners, continues to the present day.

The peculiarity respecting its commons, has been already observed.§

It returned members to Parliament from the earliest period, with some intermissions.

It had also *a court leet* at which its *steward* presided. Leet.

From ancient records belonging to the borough, in the reign of Queen Elizabeth, it appears that the inhabitants claimed the usual exemptions as tenants, in ancient demesne, which they asserted upon the authority of Domesday book,

* See before, pp. 17, 410, 536, 1181, 1200, 1716.

† See before, p. 2004.

‡ See before, p. 156.

§ See before, p. 1194.

George IV. and their claim was allowed by the queen, and the allowance exemplified.

Juries. One of the exemptions was from serving upon juries in the county, which the burgesses have enjoyed till a very recent period.

It appears that between the reign of Queen Elizabeth, and that of Charles II., the burgesses had, in some way or other, assumed to be a corporation; and in the latter reign, a quo warranto was filed against them, to show by what warrant they claimed to be a corporation, and to elect and admit as burgesses at their will, as well inhabitants within the borough, as non-inhabitants. Judgment was given and entered against them, and their franchises, real or pretended, seized.

Upon which the king granted them a new charter, turning out the old burgesses, and bringing in new ones:—the circumstances connected with which, as well as the severe conduct of Chief Justice Jefferies, has been already stated.*

Calne is also expressly mentioned in the proclamation of James II., as one of the places against which judgment had been entered up. And there seems no reason for doubting, that from that time it ceased to be a corporation, for it does not appear to have acted upon the charter of James II. which was unknown to the burgesses until a very recent period.

1691. In the third of William and Mary, the *burgesses* who had
Right. the right of election, were described in a resolution of an election committee, as "the burgesses, inhabitants within the borough;" and consistently with that determination, a part of the inquiry at that time was, whether some of the voters lived within the borough; both the petitioners and
Residence. sitting member assuming that *residence* was necessary for the burgesses.

1701. In the 13th year of William III., the question as to the
Right. *burgesses*, again came before a committee of the House of Commons, and the right of election was most correctly declared to be "in the *ancient burgesses*"—that term being

* See before, p. 1880.

probably applied in contradistinction to the burgesses, who had in former times assumed to act as a corporation; and the two stewards, called senior and junior, were declared to be the returning officers. George IV.

In 1710, this borough was again before a committee of the House of Commons, when the corporation was mentioned, but at the same time reference was made to the burgesses being sworn at "Ogborn Court," a village about 13 miles distant, which it is impossible to attribute to any corporate right or obligation; for Ogborn itself is not a corporate place; and that the members of a corporation at Calne, should be sworn in at the manor court of Ogborn, is too absurd and anomalous to be for an instant supported. 1710.

These matters, therefore, require some little explanation.

As the swearing at Ogborn was the only admission that was pretended to exist, it is obvious, coupled with the former facts, that there could be no corporation. All, therefore, which is connected with that supposition, must be a usurpation.

The remaining question is, how the swearing at Ogborn court is to be accounted for?

In the reign of Henry VIII. an exchange being made of some of the lands belonging to the duchy of Cornwall, Calne was directed to be held of the manor of Wallingford, of which Ogborn is a part, and therefore it is clear, that the householders at Calne owed suit at the manor court of Ogborn, not as burgesses, but as tenants of that manor. And their doing fealty there had, properly, no connexion either with their burgess-ship, or any supposed corporate character.

In the course of the inquiry respecting the burgesses, in the ninth of Queen Anne, the right insisted upon on the one side was in the inhabitants of the demesne houses, who, on the authority of Gateward's case,* and the others we have before quoted, had right of common, and owed suit and service at Ogborn court, though the right was improperly placed upon the ground of previous election, which could not correctly be applied to the suitors at a court 1710.

* See before, p. 1538.

George IV. baron; and though it might be applied to corporators, they could never be required to be sworn at a distant court of that description.

Nor could there be any question of the court at Ogborn being, as far as regarded the swearing of the inhabitants of Calne, a court baron, for it could not be a court leet, inasmuch as they, not being resiants within its jurisdiction, could not owe suit and service there. The use of the name of court leet, therefore, must be accounted for in this instance, as in many others before cited, by the fact that the court leet and court baron were held together.

Right. The committee decided the right to be in "the inhabitants of the borough, having a right of common, and sworn at Ogborn court."

1723. But in 1723, the same question coming again before a committee of the House, the right was again decided to be "in the *ancient burgesses* of the borough only."*

So that the only question which remained to be determined was, who were the ancient burgesses of Calne?

1830. In that state the question came again before a committee in 1830, and statements of the right being required, the petitioners delivered them, as being "in the ancient burgesses only, such ancient burgesses being the inhabitant householders, resiant, duly sworn."

Sitting members. The sitting members—"that the right was in the ancient burgesses only, meaning thereby the select body of the corporation."

Upon the statement delivered in by the counsel for the petitioners, the committee determined—That the right of election, as set forth in that statement, was *not* the right.

Upon the statement delivered in by the counsel for the sitting members, the committee determined that the right, as set forth, was *not* the right of election; but that it was in "the ancient burgesses; meaning by the term ancient burgesses, burgesses duly elected and sworn, according to the ancient constitution of the borough." And thereupon the sitting members were confirmed in their seats.

* See before, p. 2004.

This determination is certainly extraordinary, inasmuch as George IV. the sitting members had been returned by the *burgesses*, claiming to be members of the *corporation*, whose right the committee negatived. But if they intended, that though the *burgesses* were not entitled as corporators, yet having been sworn at Ogborn court, they might be entitled as sworn according to the ancient custom of the borough, in that respect also the decision was untenable: because Calne had not belonged to the manor of Ogborn, but at a period long after it had first returned members to Parliament.

CHARTERS.

There were only three charters granted in this reign.

- 1.—1827 8 George IV.—Kidderminster.
- 2.—.....—Stafford.
- 3.—183011 George IV.—Reading.

KIDDERMINSTER.

1. The following is a short abstract of the first.

It commences by reciting, that *Kidderminster* was an 1827. ancient borough. And that the *inhabitants* had enjoyed divers franchises by charter and custom, by the *name of the bailiff and burgesses* of the borough of *Kidderminster*; and that they had supplicated the king to grant them another charter.

The king then proceeds to incorporate them by the name of “the high bailiff and commonalty,” giving them the usual corporate powers, &c. And that they might have a high steward—recorder—high bailiff—low bailiff—12 aldermen—25 assistants, and town clerk, &c., for their municipal government.

The charter concludes with a clause, confirming all the privileges which the bailiff, high bailiff, capital burgesses, aldermen, common councilmen, assistants, the number of 25, the burgesses and *inhabitants*, the bailiff and burgesses, or the bailiff, burgesses, and inhabitants had ever thitherto enjoyed.

George IV.

STAFFORD.

1827. 2. The second was granted to *Stafford*,* in consequence of the corporation being dissolved, by the common council having neglected to fill up the vacancies in their body.

The charter confirmed all their former privileges, excepting that of exemption from serving on juries for the county.

READING.

1830. 3. The third was granted to *Reading*, for the purpose of adding to the number of the municipal magistrates, in consequence of the greatly increased population; and to afford facilities for the swearing of the annual officers.

CASES.

The reign of George IV. produces some municipal cases which must not be passed over.

TRURO.

1820. *Truro*, which has already been the subject of observation, stands prominent also in this and the succeeding reign.

Its charters in the reign of Henry II.—its *burgesses* in the reign of Edward I.—its bailiffs in the reign of Edward II.—its poverty in the reign of Richard II.—its *burgesses* and *commons* in the reign of Henry IV.—its *commonalty* in the reign of Henry VI.—its charter in the reign of Queen Elizabeth:†—the returns to Parliament; entries from the proceedings and presentments at the court leet; and the strange decision as to the right of election, have been already mentioned.

Truro appears to have been unfortunate in the legal determinations which have been made respecting it.‡ In the first of George IV., the charter of Queen Elizabeth came before the Court of King's Bench, upon a question arising upon that clause of the charter of Elizabeth, which directed,

* See before, p. 1492.

† See before, pp. 338, 526, 594, 752, 799, 911, 1005, 1248, 1325, 1744, 1875.

‡ The King v. the Mayor of Truro, 3 Barn. & Ald. 590.

that "when it should happen that any of the capital burgesses George IV. 1820.
 " should die, *dwell out of the borough*, or for some cause be re-
 " moved, it should be lawful for the remainder to elect others into
 " the places of those so happening to die or be removed."
 And it was held that these words were not so unambiguous
 as to warrant the court in granting a mandamus to admit
 two persons, in the room of two non-resident capital bur-
 gesses; the corporation not having previously removed them
 for this cause from their offices.

What the ambiguity is, or what the want of distinctness,
 the reader must judge. The result of this determination
 was, that the non-residents in this borough, as well as many
 in other boroughs, continued in undisturbed possession of
 their offices, contrary to the provisions and intention of the
 charters.

Again, in the second of William IV. a question arose as to 1832.
 the tolls of Truro, in an action brought by the select body
 of the corporation against the defendant, who was an inha-
 bitant of the borough.* And upon the trial it was assumed,
 that the corporation (meaning the select body) were en-
 titled by *prescription* to the tolls: with what propriety the
 former documents will have shown. This assumption being
 adopted, it was held that the prescription was *not* de-
 stroyed by a charter of Elizabeth granting and confirming,
 among other things, all the ancient rights of the corporation,
 but *exempting* the *inhabitants* from toll in all places except
 London: and that this exemption applied only to the tolls
 of other places (except London), but not to the tolls of
 Truro; and therefore the defendant, who was an *inhabitant*
 of Truro, and as such one of the *burgesses* of the place, for
 whose benefit the charter was granted, was decided to be
 liable to pay toll to the select body of the corporation, for
 goods which he had imported into the place.

The judgment of the court was chiefly founded upon the
 assumption that a prescriptive right to toll had been proved
 in the corporation. From the documents which have been

* The Mayor and Burgesses of Truro v. Reynolds, 8 Bingham, 275. Same
 v. Bastian, *ib. id.*

George IV. cited, and the passage relative to the "pretence of incorporation" in the charter of Queen Elizabeth, it is obvious that the corporation could have had no prescriptive right, because it had not existed from time immemorial; nor in truth had it any existence till the thirty-first of Elizabeth.

1832.

But even if the corporation had immemorially existed, what proof is there of its having had a right to the tolls prior to the charter of Elizabeth? and that charter exempts the inhabitants from toll—an exemption which, it should be remembered, the charter of "Reginald" also gives to the burgesses throughout all Cornwall. The evidence of a prescriptive right to the tolls commenced from 1637, a period long subsequent to the charter of Queen Elizabeth. And the leases and auctions of the quay dues were in no respect contrary to the claim of exemption from the inhabitants; because it was clear, that subsequent to the charter of Elizabeth, such tolls would have been due from all strangers and persons not inhabitants of Truro.

Living witnesses proved the receipt of dues by the mayor and capital burgesses; four-fifths of which were paid by the inhabitants. But could this modern usage be relied upon against the inhabitants, when it appeared that during all the time of the usage, although the charter of Elizabeth expressly appointed, for the benefit of the town, that the *inhabitants* should be incorporated as burgesses, yet the mayor and 24 capital burgesses had suppressed altogether the body at large of the corporation, and had themselves excluded the burgesses and inhabitants from all participation in the privileges of the place; no individual in that character having ever enjoyed any privilege under the charter (with the exception only of exemption from juries); or having participated in any manner in any act of the corporation; and notwithstanding the express words of the charter, no body of burgesses had ever existed.

There was also evidence, that the *inhabitants* had been actually excused from *anchorage* for empty vessels; being one of those things contained in the exemption given to them by the charter.

There were also variations in the amount of the tolls which George IV. 1832. had been collected, a strong token in itself of usurpation;—but these variations were attributed to clerical mistakes in the collector's accounts. An unsuccessful attempt was also shown to have been made in 1815, by the collector and town steward, to raise the tariff of Truro, to that of Falmouth and Penzance; but which was abandoned upon a remonstrance by the inhabitants.

It was said that this attempt was made without the knowledge of the corporation; but it must be remembered, that it was done by their own officers; and those officers whose acts and collections had been relied upon by the select body of the corporation in support of their claim.

At the trial, it was left to the jury to find whether the plaintiffs (that is, the select body of the corporation, the mayor and 24 capital burgesses) had shown a prescriptive right to the tolls in question, viz. *Toll to be taken by them from the burgesses and inhabitants at large.* This direction was accompanied with strong observations in support of the prescriptive proof. And upon the question, whether the charter of Elizabeth was incompatible with the presumption of such a prescription; it was stated that “that charter could not of itself “abrogate any former grant or prescription,”—which position is in its words accurate, because the king's charter cannot “*of itself*,” abrogate any former right; but the king's charter, *if accepted* by those to whom it is granted, can abrogate any former grant to the same persons, or any prescription enjoyed by them. Charter.

This position therefore might mislead the jury, because although it is true in its literal words, yet in that sense, it was inapplicable to the case; because the charter of Elizabeth had been *accepted* and acted upon; and the plaintiffs had no right to sue, but under it. Instead therefore of the jury being told that the charter by itself could not abrogate former rights; they should, with submission, have been told, that the charter granted by the king, and accepted by the *inhabitants* of Truro, could abrogate their former rights; and therefore they could Acceptance.

George IV. have no rights, but those under the charter of Elizabeth :—
 1832. and the proper construction of that charter was the only point to be considered.

It must also not be forgotten, that this was an action brought by the mayor and 24 capital burgesses against some
 Inhabitants of the *inhabitants*, who were, as it appears by the charter,
 Burgesses. the *burgesses* ; and the action was in the name of the *burgesses*, although no meeting of the burgesses or inhabitants had been held for the purpose of their assenting to the action, nor had the mayor and 24 been in any manner authorized to bring it. Indeed it was notorious, that the inhabitants were opposed to it. And thus did the select body, contrary to the wishes of the body at large, use their name against some of their own corporation : but this was a point which the court did not entertain.

The judgment given proceeded upon the assumption, that a prescriptive right to toll was proved by the usage. The only proof directly to the point, was the payment of the tolls by the *inhabitants* as well as strangers for 40 or
 Usage. 50 years : but it was during that period, that the variations had occurred in the amount received, and the attempt had been made to raise the duties to those of Falmouth and Penzance. And therefore a usage so doubtful, and so marked with usurpation, ought not to have been treated as evidence of right :—the only usage which can by law have that effect, being that which is uniform, clear, public, and undisputed.

Prior evidence from 1637, of receipts for quayage and leases of the duties, were immaterial to the point of the liability of the *inhabitants*, because they would equally have existed with respect to the tolls paid by strangers, if the inhabitants were not liable. It was said, that, “ if the court “ did not give effect to that evidence, it would hold that the “ security of rights was impaired, instead of being con- “ firmed, by long continued usage.” However the usage against the inhabitants was only 40 years ; and if it was not held to be of great weight, it would not have gone far to

impair the security of ancient rights in general;* but would George IV. only in this case have left them to stand upon any better 1832. proof which the mayor and 24 burgesses could give of the antiquity of their right.

The error noticed before, of confounding a borough by prescription with a corporation by prescription, occurs in the judgment. Truro certainly was the former, and as certainly not the *latter*.

It was supposed, that though the natural impression upon first reading the charter was, that the sovereign intended to grant the inhabitants an exemption from duties to which they were before liable, yet it was answered by a more accurate investigation of the words. Thus it was said, "that passage must mean, passing over the lands of others:"—but it should be recollected, that the lands of Truro had been in the hands of the lords—and subsequently of the crown—and passage might have been due for any person passing over them. But as the lands were subsequently granted to the burgesses, the charter might reasonably provide for the passage ceasing; or the crown might gratuitously remit it. As to "pontage," the statute of Henry VIII. had fixed the repair of bridges on the inhabitants in another shape, and therefore pontage might be excused. As to "murage," the necessity for walls had, at that time, ceased, and the probability is, that the inhabitants were actually freed from that charge.

Pontage

Murage

Therefore the assumption, that these words cannot apply to exceptions in the town, seems to be doubtful.

The clause as to fairs, it must be admitted, cannot be reasonably explained, if the general right is presumed to exist. But it is on the assumption of the right being established (which it is contended it was not) that these words of the charters are to be disregarded, and answered by the position, that "an existing right could not be taken away by mere words of addition." But the usual mode of construing the charter, would be to give full effect to all the

* See before cases as to the insufficiency of so short an usage, pp. 74, 1190, 1983, 1984, 2014, 2107, 2125, 2222, 2238, 2250, and *Rex v. Holland*, 2 East, 70.

George IV.
1832. words of it, which can easily be done, if the right is not assumed to exist.

Ancho-
rage. It is clear that the inhabitants had actually been exempt from one part of the "*anchorage*;" but it was said that the grantors might, by common consent, have relinquished that demand. The fact is, that the grantors were the *burgesses*: they had never consented to any such measure: they had never met;—their existence had never even been recognized by the mayor and 24 capital burgesses.

Reliance was also placed upon the reasonableness of the custom that the corporation, who were at the cost of keeping up the quay and adjoining streets, should raise toll to defray the necessary expence. But surely it is not very reasonable that the mayor and 24 capital burgesses should raise upon those *inhabitants* of the place who traded, instead of raising upon themselves, and the inhabitants generally, the expences of improving the town. It was admitted, that there was no evidence of any payment before the charter; nor till 1672, more than 90 years after the grant of it, when a document was proved in which the *corporation themselves*, called their own dues "*ancient*"—the charter itself having treated 50 years as a prescription, that document therefore could not be considered sufficient evidence to show that the tolls had existed before the charter. It was thought unreasonable that the corporation of Truro should levy a duty upon all the rest of the kingdom, for the support of their quay. But, with all submission to the high authority from whom that argument came—it is not inconsistent with reason—the law—or general practice, that strangers coming to a place, should pay for the advantage they received there. And that the *inhabitants*, who brought their merchandise to it, should not pay a toll for it, because they contributed to the support and repair of the town in other ways with the other inhabitants. To pay toll is the only mode by which a stranger can be made to contribute. If any of the inhabitants pay it, they contribute twice.

One of the learned judges observed, that "if the evidence "was not sufficient to warrant the inference of a legal origin

“for the custom, he did not know what title could stand the George IV.
 “test of legal inquiry:”—an observation which might be 1832.
 just, as to the right of the mayor and burgesses to toll; but as to the liability of the *inhabitants*, there was no other evidence than a varying usage for 40 or 50 years. And it is submitted, that there have been, and may be, many titles which can stand the test of legal inquiry upon much more satisfactory evidence than this.*

It was said that the variation did not apply to the charge then in issue; but the very essence of an ancient legal toll is, that it has been uniform. Now, if a toll is attempted to be supported upon usage alone, and in the tariff by which that usage is proved, there have been variations in any of the tolls, can such usage be relied upon with satisfaction, whether the variation is in the particular article insisted upon or not? because the variation in either of the items affects the usage, as much whether it relates to the particular item or another.

It was also said, that “if no corporation could maintain its tolls without producing a series of bills exempt from mistake, it is probable that no tolls could long exist.”

But generally speaking, tolls are not to be favoured by presumptions; and least of all, when in the hands of subjects. Mala tolmeta were a subject of complaint from the earliest period of our history—so that if tolls did not long exist the evil would not be very great. However, the probability of tolls not continuing to exist, for want of proof, is not alarming: because there are very few corporations who rest their right to them only upon 40 years’ varying usage, and upon bills which have mistakes in them: on the contrary, they generally rely on express grants and charters, followed up by ancient unvarying perception, and uniform schedules of the tolls.

The result of this case, establishing the claim of the mayor and 24 capital burgesses upon their fellow-burgesses, seems to be somewhat extraordinary, particularly when it

* See before, the cases against the right of so short a usage, pp. 74, 1190, 1963, 1964, 2014, 2107, 2125, 2222, 2238, 2250.

George IV. is accompanied with the other facts and documents relative
 1832. to Truro, which have been before stated. And in Bristol, Liverpool, Cork,* and Carlisle,† where the town dues have been much discussed, the *freemen* were always held to be exempt from them.

Another case is also now depending, in which the select body of the mayor and capital burgesses claim of the trading vessels, frequenting the port of Truro, a toll for meterage of coals and other articles, although as far as relates to coals, the duties having been taken off, no necessity any longer exists for measuring them, and therefore the traders are called upon to pay for that which they do not want, and the cost of the article would be so far needlessly enhanced to the public.

This closes the extraordinary history of Truro.

BATH.

The history of *Bath* we have before given; it is not like the neighbouring city of Bristol, a county of itself—nor is its separate criminal jurisdiction complete—in some degree attributable to desuetude; and partly to the omissions in its charters.

This gave birth to a decision upon the proviso in the 55th George III., c. 51, s. 1†, which states, that that act shall not give any jurisdiction to the justices of the county over any places situate within the limits of any liberties or franchises, having a separate jurisdiction. And it was held, 1822. that the provision is confined to franchises having a separate jurisdiction, coextensive with that possessed by the county justices; and, therefore, as the justices of Bath had no jurisdiction by charter to try felons, the city was liable to the county rate.

But where there was a separate jurisdiction, a contrary decision was given, and it was held that a rate, in the nature of a county rate, might be levied in *Berwick-upon-Tweed*,‡ that being a place not subject to the commission of the

* See before, pp. 2018, 2020.

† 3 Luders, 527.

‡ The King v. W. Clarke, 5 Barn. & Ald. 665.

§ The King v. the Justices of Berwick-upon-Tweed, 8 Barn. & Cr. 327.

+ *Launceston Spring Apizes 1835*

peace of any county in England, and never having contributed to a rate made for any county; although it does not lie within the body of an English county, and although no rate had ever been levied there before; the corporation having defrayed out of their own funds, the charges to which the sums raised by a county rate are applicable. George IV.
1828.

And in the same manner it was held,* that where a borough town was incorporated by charter, and certain members of the corporation were made justices, (but without power to try felonies,) and the charter contained a general non-intromittant clause, wholly preventing the interference of the county justices within the town, a rate in the nature of a county rate, might be imposed by the justices of the town, under the authority given by the 55th of George III., c. 51. 1830.

BRISTOL.

By an ancient Parliament roll, it appears that the Commons, by their petition, exhibited in Parliament, prayed King Edward III., that the charter made to his liege subjects, *burgesses* of the town of *Bristol*, and the franchises by him granted to his *burgesses*, should be ratified and confirmed in the Parliament. The answer to the petition was, that it was assented and agreed in Parliament, that the franchises, whereof the petition made mention, should be ratified and confirmed under the king's great seal. The charter was ratified by King Edward III. accordingly. It was held,† that the crown was not prevented by this proceeding in Parliament, from granting a new charter to the *burgesses* of *Bristol*, varying the mode of electing a mayor, from that provided for in the charter, recited in the petition to the king in Parliament. 1826.

Another case also arose with respect to Bristol,‡ to the following effect:—

A person carrying on trade in partnership with others, had

* *Mercer v. Davis*, 10 Barn. & Cr. 617.

† *The King v. Haythorne*, 5 Barn. & Cr. 410.

‡ *The King v. G. W. Hall*, 1 Barn. & Cr. 123.

George IV.
1822. a dwelling-house, and counting-house attached to it; the counting-house being used by the different partners, who daily resorted thither for the purposes of their trade; and the dwelling-house being occupied by a clerk or servant of the firm, paid by them; as were also the rates, taxes, &c. It was held, that each of the partners was a *householder* in Bristol, within the 26 G. III., c. 38, s. 8, although neither he nor they actually resided with their families in Bristol. So also, where the dwelling-house was occupied by one of the partners, rent free, and the taxes, &c. were paid by the firm.

However this case may be justified by the particular words of the statute, and the local circumstances as to Bristol, it is obvious that if it were applied generally to all elections, and as a general description of a *householder*, it might lead to great frauds and uncertainty; and the notoriety of who was the householder, for the information of the other candidates and the electors, would be altogether defeated.

WEYMOUTH.

1823. In a case* relative to *Weymouth* and *Melcombe Regis*, it was held, where a charter directed that, out of certain persons to be nominated in a particular mode, "the mayor, aldermen, "bailiffs, principal burgesses, and other burgesses and *inhabitants* of the borough for the time being, (they being for "that purpose congregated and assembled together,) or the "greater part of those who should be so congregated, might, "by the greater part of the voices of them so assembled, "choose one to be mayor:" that a majority of each definite body must be present, in order to make a valid election.

But we have before seen,† that where the mayor, aldermen, and capital burgesses, or other superior officers, vote with the burgesses at large, the former, though called by their names of dignity or office, yet vote as *burgesses*; it follows therefore that the whole vote as burgesses, and therefore the election is, in fact, by the indefinite body: and, if so, the attendance or non-attendance of the select body is

* The King v. R. Bower, 1 Barn. & Cr. 492.

† See before, pp. 2123, 2124.

immaterial, because the majority of the indefinite body present might make the election. George IV.

YARMOUTH.

In an action* of assumpsit for money had and received, it is stated to have been proved that *Yarmouth* had been a borough from time immemorial. But it is clear that assertion is unfounded. It is also stated, that until the time of Queen Anne, the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By the stat. 1 Anne, st. 2, c. 7, all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed; which was done by a charter in the following year. The plaintiff, having applied to have his license renewed, which was granted, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of *sixty-five* years. It was held, first, that the defendant was not entitled to take any such fee; for *the payment for sixty-five years did not raise a presumption that it had been immemorially paid* to the bailiff or mayor of *Yarmouth*; inasmuch as licenses were not granted until the reign of Edward VI., and the defendant, as justice of peace, was not entitled to any fee for granting the license.† 1824.

MONMOUTH.

The following case‡ occurred as to *Monmouth*, upon an information for *usurping* the office of *burgess* of the borough, in which it was pleaded, that it was an ancient borough; and, as usual, that the burgesses were a corporation by *prescription*, consisting of an indefinite number. That from time immemorial a *court* had been holden (amongst other things) for the election of burgesses, and notice of holding the court had been immemorially *given* by ringing 1825.

* *Morgan v. Palmer*, 2 Barn. & Cr. 729.

† See before, in *Rex v. Bird*, 13 East, per Lord Ellenborough, C. J., pp. 105, 2125, 2188.

‡ *The King v. Hill*, 4 Barn. & Cr. 426.

George IV. a certain *bell** within the town or borough. And *that*
 1825. *the burgesses*, or so many of them as choose, have a
 Burgesses. right to attend that court; and being present and attending there, have elected, and have a right to elect at their discretion, such persons to be *burgesses* as they thought fit. That before the information, to wit, on, &c. notice of holding the court was given by ringing the bell; that the court was holden; and the defendant was elected a *burgess*. The second plea set out a charter of Edward VI., and that from the time of the charter the mode of electing *burgesses* had been, for the mayor, bailiffs, and *burgesses*, being met and assembled for that purpose at a certain *court*, before the mayor and bailiffs, (notice having been given of holding the court by the ringing of a bell), had elected *burgesses* at their discretion. That the mayor, bailiffs, and *burgesses*, being in due manner met and assembled at the court, elected the defendant a *burgess*. The third plea recited the charter, and averred that it contained no directions as to the election of *burgesses*. That the mayor, bailiffs, and *burgesses*, on, &c. met and assembled at a *court* holden before the mayor and bailiffs, for the election of *burgesses* (notice having been given by ringing a bell), elected the defendant a *burgess*. The fourth plea alleged, that the mayor, bailiffs, and *burgesses* being met and assembled for that purpose at a meeting of the corporation at the guildhall, have from time immemorial elected *burgesses*; and that notice of holding such meeting during all the time aforesaid had been given, and ought to have been given by ringing a bell. The fifth and sixth pleas varied from the second and third only by substituting "met and assembled for that purpose at the guildhall," for "at a certain court holden, &c." The *seventh plea* set out a custom to hold a court before the mayor and bailiffs every Monday, and that the *burgesses* "being met and assembled for that purpose," at the court, had elected *burgesses*.

* See Dover case, Glan. p. 64: the public meetings were called together by the blowing of a horn. See also post. *Rex v. Sir George Chetwynd*. And *Chester*, ante, 1165—*Shrewsbury*, ante, 2092—*St. Saviour's*, *Southwark*, and *Wallingford-Lane*, 21.

That on, &c. the court was holden for the election of ^{George IV.} burgesses, and that the burgesses then and there so assembled together as aforesaid, elected the defendant. The eighth *plea* set out a non-existent bye-law, providing for the election of burgesses in the same manner as the custom set out in the first plea. It was held, that all the pleas were bad. The first six and last, because the notice by the *ringing of the bell* of holding the courts or meetings in those pleas mentioned as there described, was *not a reasonable notice** of the courts or meetings, or of the purposes for which they were holden, and was therefore insufficient; and the *seventh* plea because it did not state that the Monday's court was always holden for the purpose of election; and notice of the intended election was not stated as a part of the custom, which was therefore unreasonable. *Secondly*, because the defendant did not, in stating his election, bring himself within the custom.

The *replication to the seventh plea*, being that the burgesses met and assembled at the court, as in *the seventh plea* mentioned, were not in due manner met and assembled for the election of burgesses—upon general demurrer seemed to the court to be good.

Thus, by involving these questions in the intricacies of corporation law, instead of allowing them to be settled by the general and simple rules of the court leet, this case was embarrassed with technical difficulties of the greatest nicety. And had the principle been kept in mind, that every person was bound to attend at the court leet, even without notice; or if a special court was held, the inhabitants of the place ought to take notice of so public an act as ringing the bell, which was kept for the purpose—the decision could hardly have been arrived at, that the notice was not reasonable.

* And yet this has been the mode of giving notice of public meetings from a very remote period; and probably had a written or verbal notice been given of the meeting, instead of ringing the bell, it would have had a greater tendency to have misled the burgesses.

George IV.

NOTTINGHAM.

1825. The following case relative to *Nottingham*, is added as a sequel to those already detailed in the reign of James I., with reference to the right of common; and also as connected with the question relative to the ancient messuages, which was discussed before the Steyning committee.

The *burgesses* of Nottingham, and the occupiers of *ancient** messuages there, had, as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude, during that period, the owner of the soil: it was held, that this was a mere right of common, and not rateable to the relief of the poor.†

FOWEY.

Nothing can be more essential to the due observance of the provisions of the king's charters, and the full execution of the public duties both of police and government, than that those who are intrusted with the superintendence of these important matters, should at all times be compelled to execute, to the fullest extent, all that is necessary to be done, not only for the present immediate benefit of the public, but also to prevent the possibility of future public inconvenience; and, therefore, it might perhaps be excusable to regret that the court should have felt itself called upon to withhold its aid in compelling public functionaries faithfully and effectually to discharge their duties—particularly if there were the slightest ground for supposing that there were any private or sinister views in the parties who were backward in pursuing the ordinary course of their institutions.

The borough of *Fowey*, was by a charter constituted a body corporate.‡ Nine of the free burgesses were to be chosen aldermen—one of whom was to be called mayor—

* The King v. Churchill and Booth, 4 Barn. & Cr. 750. See also Rex v. Mayor, Aldermen, and Burgesses of Sudbury, 1 Barn. & Cr. See before, the cases as to right of common, pp. 1529, 1533, 1538—1544.

† See the decision of the committee in the Steyning case, 1792, before, pp. 2116.

‡ The King v. the Mayor, Recorder, and Aldermen of the borough of Fowey, 2 Barn. & Cr. 514.

and the mayor and aldermen were to form the common council. The charter then authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough, for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, when to them it should seem fit and necessary, to nominate, choose, and prefer so many and such persons to be *free burgesses* of the borough, as they pleased; and to those free burgesses so to be chosen, to administer an *oath* for their fidelity to the borough; and in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of the peace, and the rest of the aldermen, or the greater part of them, were to elect one other of the free burgesses, *inhabitants* of the borough, for an alderman, to supply the number of nine; the aldermen so chosen taking the oaths before the mayor, recorder, or one of the justices of the peace of the borough for the time being, or before two or more aldermen; or for want of the mayor, recorder, justices, and aldermen, before three or more free burgesses, *inhabitants* of the borough, to execute the office: and the mayor, the ex-mayor, the recorder, and their deputies, and the senior alderman, and the senior free burgess, were to be justices of the peace. It appeared by affidavits, that the body corporate had for three years been reduced to the number of six aldermen and four free burgesses, and that one of the aldermen was in a dangerous state of health, being upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the *four burgesses, two were' upwards of seventy years of age*—and that another was *not an inhabitant* of the borough. The court *refused* to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election, &c.

George IV.
1825.

Burgesses.
Oath.

Inhabitants

George IV.

COLCHESTER.

1826. A charter incorporated "the men and free burgesses of the borough of *Colchester*."* And declared that for ever thereafter, there should be within the borough, to be chosen out of the free burgesses, 18 common councilmen; and then nominated 18 persons to be the first common councilmen. It was held that this charter virtually made them also *free burgesses*.

STAFFORD.

1826. The following cases seem to afford apt specimens of the nice distinctions and technical points in which matters connected with the corporate doctrine, are involved. And it can scarcely be expected that one important object of all law—that it should be intelligible to the public—can be attained by such discussions as this case discloses.

To an information for usurping the office of justice within the borough of *Stafford*,† the defendant pleaded that he was elected at a corporate meeting, where a majority of the aldermen and corporate burgesses were present. The replication alleged, that at the supposed election, five capital burgesses (described by their names,) and none others, were present, and that they were not the major part of the capital burgesses. The rejoinder alleged, that at the election, besides the five capital burgesses named in the replication, there were present K. and T., being then capital burgesses, and that the five capital burgesses named in the replication, together with K. and T., were the major part of that body. The surrejoinder stated, that K. and T., before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant, were present as aldermen; and that before the defendant's election, two other persons were elected, and admitted as capital burgesses in the room and stead of K. and T. The rebutter averred, that at the election of K. and T., as aldermen of the borough, the

* *The King v. Downes*, 5 Barn. & Cr. 182.

† *The King v. J. M. Hubball*, 6 Barn. & Cr. 139.

major part of the aldermen were not assembled, and that after the election of K. and T., and before the election of the defendant as justice, and whilst K. and T. exercised the office of aldermen, informations in quo warranto were filed against them, and judgment of ouster given, with a traverse that K. and T. ever were aldermen: upon demurrer, it was *held*, that notwithstanding the judgment of ouster, K. and T. could not be considered as having attended at the election of the defendant as capital burgesses, and that judgment must be for the crown.

George IV.

1828.

Upon another information for *usurping the office of burgess of Stafford*, the plea alleged as usual, that the burgesses *were corporate by prescription*,* as well as charter, and that the *common council*, or the major part of them, duly assembled for such purpose, from time to time, as often as it seemed fit and convenient to them, had elected so many persons to be *burgesses*, as to them seemed fit.

1828.

Burgesses.

After setting out a charter by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses, and that they should be the common council for all things touching the government of the borough; the plea stated, that from thenceforth there had been, and still were within the borough, a *mayor, ten aldermen, and ten capital burgesses*, and an *indefinite number of burgesses*, and a *common council*; that on, &c., the then mayor and divers, to wit, *nine of the aldermen* of the borough, being the major part of the aldermen, and *nine of the capital burgesses*, being the major part of such *ten capital burgesses*, being the major part of the common council, duly assembled for the purpose of electing a burgess, it seemed fit to them to elect the defendant to be a burgess. The replication alleged, that notice of the purpose for which the supposed assembly of the common council was to be held was not, at any time before the assembly was held, given to the aldermen or capital burgesses of the borough; upon *demurrer*, it was *held*, that the replication was *bad, because it assumed*, as a general proposition of law, that there *could not be any lawful assembly*, for the

* The King v. Sir G. Chetwynd, Bart., 7 Barn. & Cr. 695.

- George IV. purpose of electing a burgess without previous notice of the
 1828. purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary.*

DEVIZES.

1827. By charter of the 10th James I., reciting that the borough
 Devizes. of *Devizes* was an ancient borough, and that the mayor and burgesses, time out of mind, had enjoyed divers franchises;† the king confirmed to the mayor and burgesses all privileges, &c.; and granted that the mayor, burgesses, and their successors, and the mayor and town clerk, together with 36 burgesses, being the common council, or the greater part of them, should nominate one of the number of twelve chief burgesses counsellors, to be mayor; and further, that the mayor,
 Burgesses. town clerk, and thirty-six chief burgesses, should elect all officers, and also make all free burgesses. It then granted to the mayor and chief burgesses being counsellors, and the common council, a power of imposing fines; and that the mayor and burgesses, and their successors, should hold within the borough a court of record, before the mayor, town clerk, and chief burgesses, being counsellors; and that all manner of pleas should be determined before the mayor, town clerk, and chief burgesses being counsellors; and that the mayor, town clerk, and one of the chief burgesses counsellors, (to be chosen by the mayor, town clerk, and common council) should be justices of the peace within the borough. By a subsequent charter, reciting the former, King Charles I. confirmed the same, and granted, inter alia, that the mayor, recorder, and the chief burgesses, being the common council for the time being, (of which chief burgesses some were known by the name of chief burgesses counsellors,) should have the power to elect one of the chief burgesses and counsellors, to be mayor; and that the mayor, and recorder, and chief burgesses of the com-

* See before, *Rex v. Hill*, p. 2210, case as to notice by a bell.

† The *King v. Headley and others*, 7 Barn. & Cr. 496.

mon council of the borough, should have the power to elect all officers; and also of taking thereafter all *free burgesses* into the number of free burgesses: It was held, that by these charters (there being no evidence of usage prior to the granting of the charter of James I.) the 12 burgesses counsellors did not form an integral part of this corporation for the purpose of electing free burgesses; and the right of electing free burgesses was in the mayor, recorder, and the 36 chief burgesses, or the major part of them; and, consequently, that to make a good election of a free burgess, it was sufficient if the mayor, recorder and a majority of the 36 chief burgesses were present.

George IV.

1827.

Burgesses.

Usage.

DONCASTER.

In the following case, the right of admission by servitude, was erroneously attributed, as we have before observed, to custom, rather than the common law; and such right seems to have been assumed, contrary to the authorities we have before shown, to be referred to a connexion with trade, with which it had no direct affinity.

In *Doncaster*, which is a corporate town, by custom, all persons having served an apprenticeship for seven years to a free burgess carrying on trade there, were entitled to be admitted to the office of *free burgess*.* It was held, that a person who had served under articles to an *attorney*, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom.

1828.

Lord Tenterden said, that a person who served an attorney under articles of clerkship could hardly be said to be an apprentice within the popular meaning of the term, and the right in this case was confined to such persons as had served an apprenticeship. An attorney carries on a profession, and not a trade.

But it would be difficult to say, that an articulated clerk, who is bound by his articles for the purpose of learning his profession, was not an apprentice; and it will be remem-

* *The King v. The Mayor, Aldermen, and Capital Burgesses of the borough of Doncaster*, 7 Barn. & Cr. 630.

George IV. bered, that the earliest document which has been quoted relative to apprentices was one which referred to the profession of the law.* It has also been shown that the connexion between apprenticeship and burgess rights, was originally founded upon the common law, and not upon trade.

LONDON, &c.

1828. The following case is in some degree applicable to the principle, that corporations require to be locally fixed in some place—and also affects the question, as to what extent bye-laws can be made to bind strangers, or to impose a penalty for refusing to accept office, even in a company which has no municipal government: and likewise refers to the question as to the expenditure of the common stock of boroughs and companies.

London
and West-
minster.

The king by charter incorporated the tobacco-pipe-makers in *London* and *Westminster*, England and Wales; and after naming the first master, wardens, and assistants,† provided for the future election of officers, and the transaction of other corporate business, at meetings to be holden in a hall in London, or within three miles thereof. And that the master, wardens, and assistants, should there yearly elect out of the assistants, four to be wardens of the society; and it then authorized the master, wardens, and assistants, to make bye-laws for the government of the society, and every member thereof, and every person using the art and mystery of making tobacco-pipes, in London and Westminster, and any other parts or places in England or Wales. It was held, that although the charter might be inadequate to bind all the tobacco-pipe-makers in the kingdom, it was competent to bind such of them as became members of the corporate company.‡ Secondly, that the charter, by fixing the place of meetings to London or Westminster, or within three miles

* See before, pp. 696, 722.

† The Master, wardens, assistants, and fellowship of the company of tobacco-pipe-makers, of the cities of London and Westminster, and kingdom of England, and dominion of Wales, v. Woodroffe, 7 Barn. & Cr. 838.

‡ There is a stronger obligation upon inhabitants in a borough to obey the bye-laws made by their municipal governors.

thereof, sufficiently established local limits for the corporation. Thirdly, that a bye-law, which imposed a fine on every master, warden, or assistant, who should not attend all courts to be holden, was a valid bye-law. Fourthly, that a bye-law, that if any person chosen to be warden, should refuse to accept the office of warden, he should forfeit to the company, 6*l.* 13*s.* 4*d.*, was good; the words "any person" applying to persons eligible by the terms of the charter to the office of warden. Fifthly, that a bye-law, that every freeman, using or not using the art, mystery, or trade, should pay yearly to the company 8*s.*, to be paid quarterly, and every journeyman of the company 4*s.* yearly, to be paid quarterly, and that every person refusing should forfeit twice the sum, was *bad*; inasmuch as it did not appear that any rightful expenditure of the company required such a contribution.

George IV.

1828.

Common
fund.

SUNDERLAND.

The next case involves an important consideration. After the extensive and arbitrary manner in which informations of quo warranto were used in the reigns of Charles II. and James II., and the judgment in the London case being, in the reign of William III., declared illegal by the Legislature, the law officers of the crown became extremely cautious in resorting to those proceedings: and probably to that feeling may be attributed their disinclination to interfere on many occasions where the interests of the public would seem to have required their interposition.

From their abstinence there can be no doubt but that many abuses, both of omission and commission, were allowed to continue, which their timely interference would have prevented or corrected.

The officers of the crown thus neglecting to proceed against the municipal abuses, and the perversions of the royal charters, a more ready disposition in the courts to aid the applications of individuals would seem to have been expedient.

But technical rules restrain their proceedings, and ~~and~~ 1829

George IV. recent occasion the Court of King's Bench, in a case from
 1829. Sunderland, was compelled to decide, that an information in
 Quo war- the nature of a quo warranto, against persons for claiming
 ranto. to act as a corporation, must be filed by and in the name of
 the attorney-general.*

Such an information cannot be filed at the instance of an individual, against persons for usurping a franchise of a private nature not connected with public government.

The latter qualification of the rule in some degree lessens its general application; otherwise, by the non-interference of the law officers, and the inability of the court to interpose, the abuses and usurpations must grow up to an unrestrained extent. And under such circumstances it is impossible that *usage* can have any weight as evidence, when if it is usurpation there is no mode of correcting it.

LUDLOW.

1829. By a *charter of Queen Elizabeth*, it was provided, that vacancies in the common council of the borough of *Ludlow*, should be filled up by election out of the "burgesses and *inhabitants*." The charter was accepted, but the corporation afterwards elected burgesses, not being *inhabitants*, to the office of common councilmen, as they had done before. This charter, and all other franchises, were *surrendered* in the time of *Charles II. And William and Mary*, by a charter of *restoration*, granted that the corporation should enjoy all franchises, elections, rights of election, &c., which they had previously enjoyed by virtue or pretence of any charter, or by any other lawful manner, right or title. It was *held*, that under the charter of Elizabeth, burgesses could not be elected to be common councilmen unless they were *inhabitants*, and that a *usage to elect burgesses not inhabitants*, was *repugnant to the charter*, and could not be pleaded in explanation of it. It was also held, that the charter of William and Mary only *restored such rights as had been lawfully exercised* under or by pretence of former charters; and, therefore, did *not enable the corporations to elect bur-*

Usage.

* The King v. Ogden, and four others, 10 Barn. & Cr. 230.

gesses, not being inhabitants, to the office of common councilmen.* George IV.
1829.

The above decision, sound, plain, and constitutional, protects the charters of the crown from being abused—represses unauthorized *usages*,—and gives a reasonable application to the words in the subsequent charter.

NORWICH.

By several charters the sheriffs of *Norwich* were to be chosen by the citizens and commonalty “from themselves.”† 1830.
A subsequent charter, confirming former privileges, and regulating the time and mode of electing sheriffs, omitted the words “from themselves.”

The usage however, both before and since, had been to elect from among the freemen. *Held*, that the last charter was not meant to vary the qualification; that the restriction in the former charters could not be dispensed with; and that the election of a person not free was irregular.

The same observation may be made upon the clear and practical principle contained in this determination, by which the former charters and the ancient *usages* are preserved in their integrity, and a reasonable limit is put upon the effect of the new grant.

LONDON.

A person is not liable to serve the office of constable unless he be *resiant* in the parish.‡ 1825.
And therefore a person occupying a house, and paying all parish rates in respect of it, and carrying on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but *not sleeping in the house*, is not liable to serve the office of constable in the parish where the house is situate.

The above case is rather more involved in legal niceties than the two preceding, and perhaps there is some difficulty

* The King v. Solway, 9 Barn. & Cr. 424.

† The King v. Grant, 1 Barn. & Adol. 104.

‡ The King v. Adlard, 4 Barn. & Cr. 772.

George IV. in distinguishing it in principle from that of the *King v.*
 1825. *Poynder*,* which we have before quoted and commented upon. The distinction founded upon sleeping or not sleeping in the house, is surely too minute for the dignity of the law to stoop to consider; and some instances might be suggested, where if sleeping were necessary, it might be established that a person resided nowhere. The practical rule founded upon commorancy, or in the language of the old law, being "conversant" in a place, either for business or pleasure, and having a domicile, is a more tangible and intelligible principle, and would have been easily determined by the law and practice of the court leet.

LEET.—PETERSFIELD.

1823. The two following cases are instances of the existence and continued exercise of the jurisdiction of the court leet, in Petersfield, West Looe and numerous other places.

It was decided as to Petersfield, that a regular *usage* for 20 years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom *for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury; and it is a good custom.*†

Usage. This is one of the numerous cases which are often cited to support the doctrine of *usage*, and had not the law in that respect been carried further than it is by this decision, it would have been impossible to complain of the rule. For this case only decided, that when an act for the public service must be done by somebody, and it had been executed without question for 20 years by a particular public officer; and there was no evidence of any other person having done the act, this was held to be sufficient evidence of an immemorial custom for the officer to do it; the court at which it was to be done being a prescriptive court.‡

* See *Rex v. Poynder*, before, pp. 1514, 1659, 2221.

† The *King v. Joliffe*, 2 Barn. & Cr. 45.

‡ But Lord Tenterden in delivering his judgment, qualified it by describing this as a case, in which there did not appear to be any thing in the usage contrary to public policy or expediency.

CHESTER.

But there are other cases, in which the doctrine has been carried to a much greater extent; and in some instances against the apparent meaning of the king's charter. Instances of that kind have been remarked before. And in a case of 53 George III.,* where a charter of Henry VII. directed, that certain members of a corporation should be able, in every succeeding year, to elect 24 citizens to be aldermen, &c. the court refused to grant a mandamus to proceed to such an election—the only instances of usage being in 1693, and the two following years in which two such elections were said to have taken place; and the express words of the charter were pressed upon the court.

But *Lord Ellenborough* said, “the words of the charter “were not compulsory, they were *eligere possint*; that is, “they had power, but were not compelled to elect; and he “added, it was an extremely unusual practice in corporations, “as founded either upon usage or charter, to elect all the “corporate officers annually.” And his lordship also referred to a case in the time of Lord Kenyon, in which the usage had prevailed almost against the words of the charter. The court not being willing to interfere against the long continued usage.

His lordship also said, that the usage in the case before him had been uniform, for upwards of a century, and was not inconsistent with the words of the charter. He was therefore disinclined to disturb it by granting the rule, especially when another remedy was open to the parties.

With submission to the noble lord, it might be doubted whether the words “*eligere possint*,” used in a charter of the crown with reference to public officers, ought not clearly to be considered as compulsory—either as regarded the right or obligation of the parties concerned. If the offices to which the parties were to be elected were honorary and desirable, it would seem that they should not be enjoyed to the exclusion of others in their proper course for more than 12 months;

* *R. v. the Mayor and Citizens of Chester*, 1 Maule & S. 101.

George IV.

on the contrary, if the offices were burdensome, then the elected ought not to be bound to execute their functions for more than the period mentioned in the charter; and therefore it would appear on both these grounds, that it would not have been injurious—but on the contrary, consistent with the probable intention of the crown if the words had been held to be compulsory, and the elections had been annual. But the noble lord seems to have relied in some degree upon the *usages* in other places, which is a dangerous ground to adopt, inasmuch as there are no means of ascertaining the facts accurately; nor, properly speaking, are they before the court. In many instances, such assumptions have led to unjustifiable results.

Another remedy was also suggested, which, however, was of so little avail, that the question has not since been brought into discussion; and the annual elections do not take place, notwithstanding the apparent intention of the crown.

WEST LOOE.

1822. The next case is one in which the contrary course seems to have been adopted.* In that instance there was an undeviating usage, from the earliest time the records existed, which was as early as the reign of Henry VIII., that the *inhabitants* *resiants* had been called over, presented, enrolled, and sworn at the *court leet*. And strong circumstances were laid before the court, showing the means by which the ancient system had been destroyed and a new system introduced. Upon which an application was made to the court for a mandamus to swear and enrol as a burgess, at that court, a person who was an *inhabitant householder* within it.†

The first objection suggested by one of the learned judges was, that a free burgess was a corporate officer. But the previous documents will have afforded a decisive answer to that supposition.

It was then suggested, that if they were not corporate officers, the court could not interfere.

* See the *King v. the Mayor, &c. of West Looe*, pp. 1695, 2224.

† See also post. *Ireland, Sligo case*.

That point has also been answered ; and if the situation of George IV.
1822. a burgess is connected with the municipal government of the borough, as undoubtedly it is, there can be no question but that the high prerogative writ of mandamus should be applied to enforce the due admission, whether they had the superinduced qualification of burgess or not.

The learned Chief Justice most justly assumed that there might be corporations which were not prescriptive. It has been shown that there were no prescriptive corporations.

Still the doctrine was held, that if it was not a corporate office, the court could not interfere ;—an opinion founded, as it is humbly conceived, on the mistaken importance given to the word “ corporation,” and on the assumption that the court could not interfere, but to support a prescriptive right; whereas it is obvious, that the prerogative writ should issue to support rights under the general law, or particular grants of the crown, or legislative enactments.

It was truly observed by one of the learned judges, that the persons enrolled and sworn at the court leet, ceased to be villains ; but the same high authority might also have admitted, that a person so *enrolled* and *sworn* as an *inhabitant householder* within a *borough*, became thereby a *burgess*.

Lect.

The Chief Justice, in giving his judgment, distinguished the case from those which were cited, by the fact, that in these cases there was a freehold interest in land. It has been shown that burgess-ship did not depend upon tenure, but the learned judge said, “ if it had been so in this case it “ might have appeared in a different light.” With submission, it would have been in a worse light ; for it would have been connected with the usurpations attached to the supposed freehold right of burgess-ship.

Tenure.

The same authority observed, that the object of the motion was, to persuade the court, to order a party to be admitted to an *office*, which was to confer some benefit upon him, without showing that he had any inchoate right by prescription to fill that office, and receive the benefit. And that a free burgess was a *corporate* officer without a prescriptive

George IV. right, and in favour of such a party, a mandamus would not
1822. lie.

But the application, it is submitted, was *not* to be admitted to an *office*, but to be *sworn* under the common law at the court *leet*, as a *free inhabitant householder*.
Leet.

And as to the supposed benefit to be derived, it was connected with duties, as well as privileges, and whether it was the one or the other, was immaterial to the court, who had only to consider that right and justice should be enforced by their mandatory writ.

No inchoate title by prescription was insisted upon; but the *right* and *duty* to be *sworn* to his allegiance, and *enrolled* as a burgess according to the requisites of the common law. And a free burgess was not a corporate officer, but a class or condition in life, which had existed long before the corporation in West Looe, or any municipal corporation in the country, as the documents quoted before have now abundantly proved.

Quo war- An application for a quo warranto against the mayor, on
ranto. the ground that he had not been duly elected by the body at large of the *inhabitants*, was also refused at the same time, upon the extraordinary ground—considering the opinions and dicta which have been from time to time quoted—that the word “*INHABITANTS*,” CLEARLY MEANT THE BURGESSES; and therefore, that the *inhabitants*, though expressly mentioned in the charter, had not a right to interfere in the election of mayor; but that he was duly elected by the capriciously-chosen burgesses, many of whom, were non-resident.*

MAIDSTONE.

1828. Another case relative to a *court leet* occurred with respect to *Maidstone*: a rule being obtained for a mandamus, directing the proper officer at the next *court leet*, to administer the oath of allegiance to a person who was an *inhabitant householder* within the borough.†

The Chief Justice observed, that a mandamus for such a purpose was perfectly new. But the peculiar characteristic

* See the case at length, at the close of the West Looe Case, Lond. 1823.

† 6 Dowl. & Ryl. 334.

of the prerogative writ of mandamus, is to supply relief ^{George IV.} when no other specific remedy is provided; and it presupposes no precedent, because it is to be applied to new mischiefs. _{1828.}

It was also stated hypothetically, "that if the applicant was liable to any penalty for not having taken the oath of allegiance, he would be exempt from such penalty by showing that he had offered to take it." But there is no possibility of doubting that the law peremptorily required every male inhabitant householder of the proper age, within the jurisdiction of the court leet, to take the oath of allegiance; and if he did not do so, he was liable to amercement. And it is a novel proceeding for a court of law, of such plenary jurisdiction as the Court of King's Bench, to find an excuse for the omission of doing an act required by the law, rather than to compel its being done.

The taking of the oath was attributed by the court to the statute of the 7th of James I., which was enacted with a particular view; instead of being referred, as the law prescribes, to the court leet, where, beyond all question, it ought to be taken, notwithstanding it were also taken elsewhere.

The reader, therefore, must consider these cases with reference to the principles which have been elicited from the ancient law, as traced from the early times—recognized in the successive statutes from Magna Charta—and in truth confirmed by the charters and the practice even to modern times:—though the oaths taken by freemen have mistakenly, and from a forgetfulness of the nature of our early institutions, been absurdly applied to the modern usages of corporations. Oaths.

There was also another case, in which it was doubted in the Court of King's Bench, whether an inhabitant, to be within the purview of the law, must be a *householder*. Such a question, in the abstract, might seem to be involved in some difficulty: but taken with reference to the records, and de- Householder.

George IV. cided cases which have been quoted in succession from the earliest times, it is too plain to require further observation.

WYCOMBE.

1829. The House of Lords* in its appellate, and the Court of King's Bench,† in its original jurisdiction, were also during this reign, engaged in the consideration of the case of quo warranto against *Thomas Westwood*, for usurping the office (as it was called) of a *burgess* of *Wycombe*.

Besides a question, whether a charter could be partially accepted—which in this case was a matter of subordinate consideration—the more material point in dispute between the litigant parties—that to which the case principally resolved itself—and which bears on the present inquiry—was, *whether a supposed bye-law, made by the burgesses at large, to restrain the right of electing burgesses, to the SELECT BODY of bailiffs and aldermen, (being the common council) was in law, and in this particular case, a valid bye-law.* In the Court of King's Bench, the judges were divided on the point: two of that learned body giving their opinions in support of the bye-law—one decidedly against it; and the Chief Justice having considerable doubt at which conclusion he ought to arrive.

Judgment was accordingly on this point given for the defendant; supporting his title to the office under the election by the select body.

Against this judgment a writ of error was brought in the House of Lords; and the case was argued at much length, and with great ability at the bar, in the presence of the judges; who as the matter appeared to be of much importance and difficulty, had been summoned to attend the argument; after which a question was resolved to be submitted for their consideration; and the 16th of February was appointed for the delivery of their opinions upon the points submitted to them.

The question was whether the bye-law was valid?

* See 7 Bing. 1.

† See 4 Barn. & Cr. 78.

On the day appointed, the Chief Justice of the King's ^{George IV.} Bench, appeared in his place in the House. The Chief ^{1829.} Baron, three Judges of the Court of King's Bench, two Judges of the Court of Common Pleas, and two Barons of the Exchequer, attended on the woolsack. The other learned judges were absent, as they had not been present at the argument.

The judges who were present delivered their opinions—, three of them giving their judgments for the crown, and against the bye-law; the other five of them deciding against the crown, and in favour of the bye-law.

The Chief Justice of the King's Bench postponed the delivery of his judgment, and the House was adjourned.

Under these circumstances, this case, in a legal point of view, considering the difference of opinion which has existed respecting it, assumes an interesting aspect; and in a constitutional point of view, it is impossible for a more important question to have arisen.

The direct struggle between the parties, was, whether the select body in the corporation, the bailiffs and aldermen, being the common council, should possess the entire power in the borough; or whether the burgesses should enjoy that share in the management of the town, which the charter apparently gives to them.

If the right of making burgesses was vested in the select body alone, the whole corporation would in effect be in their hands—the number of the burgesses would be kept, as they had been, below the number of the common council; and by that means the latter would secure a perpetual ascendancy. On the other hand, if the body at large had the right of making burgesses, they would at least have the power at all times of correcting any undue influence or misconduct of the select body, and of restraining their control within proper limits.

In many of these corporations, through the agency of the select body,* the *burgesses* have been reduced to the smallest

* This was the great evil in the parliamentary representation of corporations, produced in the manner here stated. In burgage tenure, another source of

George IV. possible numbers*—three, two, or one—nay, in some, as
 1829. already shown, that class of the corporate body has been altogether suppressed :† notwithstanding, the corporations were, by the governing charters, to consist of a mayor, aldermen, assistants, AND COMMONALTY.

Calne. There is also an instance where a corporation having lost their charter, and judgment of seizure having been entered against them, which remains unvacated—though no subsequent charter has been granted—yet they still continue to act as a corporation: and till the Reform Act passed, returned their members to Parliament by burgesses elected amongst themselves.

Too often, it will be found, that the declared intention of the crown, and the express words of the charters are defeated, by the *usages* and bye-laws of the grantees of the crown.

Whether that were so in the present case, was the principal controversy between the parties.

To ascertain which, the short account of the *borough*,‡ given before, with a few additional facts, will suffice.

This place is said to have been first incorporated in the reign of Edward IV.; and the returns to Parliament were made at that period, and subsequently, in the name of the mayor and *burgesses*.

1673. In 1673, there was a petition by the burgesses, freemen,
 1702. and inhabitants. And 1702, by Lord Shelbourne; on the
 Right. hearing of which, the right was *agreed* to be in the mayor,

abuse, it was effected by the landed property being acquired by one individual. The two striking instances of this abuse have been already mentioned—Old Sarum and Gatton. But it is a curious ground of objection to these usurpations, that even James I., tenacious as he was of the prerogative, yet opposed himself to this glaring usurpation upon the constitution; and, accordingly, in his proclamation, on his accession, after having summoned his first Parliament, amongst other things he directed, that the members should be men of good behaviour and sufficiency—taxed and paying subsidy; and that the sheriffs should not send precepts to any town so ruined, that *there were not enough residents to elect and be elected*. 5 Parl. Hist. p. 7.

It is obvious how consistent this direction is with the spirit of the law and constitution; and had it been attended to, it would have corrected the anomalies of Old Sarum, Gatton, and Aylesbury.

* See before, the Fowey case.

† See Truro, Salisbury, &c.

‡ See before, p. 1214.

bailiffs, aldermen, and *burgesses*—and the controversy was only upon the manner of making the latter. George IV.
1702.

For the petitioner it was insisted, that the *burgesses* ought to be made with the consent of the major part of all the *burgesses*, duly summoned, and assembled in the common hall; and it was proposed to take from the poll of the other candidate so many *burgesses*, on account of their not being regularly made, as would give the petitioner a majority.

Evidence was adduced, that 21 had been made at a public-house, in January, 1698, without notice or summons to several of the aldermen or capital *burgesses*; and not at the town-hall, where all such meetings ought to be held; the aldermen protesting against, and complaining of this proceeding. Two individuals were admitted at an entertainment of the mayor; and another was made a *burgess* and alderman, on the same day, and in the like manner.

On the other side, it was contended, that those three *burgesses* were made by the mayor and seven others, who are a majority of the 15, in whom the sole power is vested of making *burgesses*. That the election at the public-house was only an adjournment, and a fresh election, after a previous one had been duly made in the hall: and the summoning of all the aldermen was proved, as well as the usual tolling of the bell.*

The committee resolved, and it was agreed to by the House, that the sitting member, Mr. Dormer, was duly elected.

In 1725, a petition, amongst other things, stated, that the votes of two persons were expressly ordered to be entered by the mayor, although they owned they had no other authority than an *illegal charter of King James II.* Other irregularities were imputed to the mayor: and he was committed to the custody of the serjeant-at-arms, for not permitting an inspection of the *public* books, records, and public writings belonging to the borough. 1725.

On the reading of several entries in the town books, it was resolved, that it appears to this House, that in an entry

* See before, Dover, Monmouth, and Shrewsbury cases.

George IV. of burgesses made on the 20th of March, 1717, there has
 1725. been an *erasure** lately made, and the name of Captain
 Erasures. Pigot inserted, without any legal authority.

That in an entry of burgesses made the 26th of September, 1723, another *erasure* had lately been made, whereby the name of David Shilfox, a burgess of the borough, was erased.

And also that two persons had voted, having no pretence to be burgesses of the borough, but under a charter of King James II., which was never accepted or enrolled; and that they had no right to vote.

The sitting member was unseated, and the petitioner declared duly elected. The mayor was committed to Newgate, for his arbitrary, illegal, and partial proceedings, in violation of the freedom of election. And a person who had presumed to read the Riot Act before the election, was resolved to have been guilty of a high infringement of the freedom of election; and was ordered into the custody of the serjeant-at-arms.

Such is the short history of the borough of Wycombe. From which it appears, that it was not a borough till the reign of Henry III.; some time subsequent to the period of legal memory. That it was not a corporation till a long time afterwards; that it returned members to Parliament by the *burgesses*, long before it was a *corporation*, and as early as the 28th of Edward I.; and it is clear and indisputable law, that the same class of persons who were then the electors, as *burgesses*, must have continued so, unless they had been changed by act of Parliament. The right of electing members of Parliament having been once attached to a particular class, could not be taken from them, or transferred to others, by the king's charter—nor by any bye-law—nor any thing short of a legislative authority.

If the king afterwards incorporated the place, and made a new class of *burgesses*, (for freemen there is no foundation,) still the same class of persons must have continued to vote for members of Parliament as before, notwithstanding

* See cases before, of Poole, Colchester, Queensborough, Winchester, &c.

the incorporation.* And, therefore, it is impossible that George IV. in this case the right of election could be in the corporators; there being no such class of persons when Wycombe first returned members to Parliament.

This, whatever may be said or surmised to the contrary—or however willing any persons may be to shut their eyes to the truth—or to disguise the history of this place—or the law—fixes both the parliamentary and municipal rights in the ancient "*burgesses*:" that is, the inhabitant householders Burgesses. of the place; *free* by condition, and therefore "*liberi homines*"—~~sworn~~ to their allegiance, and therefore "*legales homines*"—who consequently performed all the important public functions of the places in which they resided.

However, let the ancient right of parliamentary election be what it may, it is now only necessary—after having exhibited the arbitrary acts of those who had power in Wycombe—to ascertain, whether it is not clear that the parliamentary and municipal rights of that place were, even under the charter, vested in the "*burgesses*:"—made so—not by the select body, according to the usurpation which was insisted upon—but by the body of burgesses at large, *according to the words of the charter.*

This leads to the consideration of the case of *Rex v. Westwood*, which has been so much argued and discussed. Rex v. Westwood 1829.

The defendant Thomas Westwood, in answer to the information filed against him, pleaded—a custom for the mayor and common council, by themselves, and without the concurrence or assistance of the rest of the burgesses, to nominate such persons to be burgesses, as to them should seem meet:—and he alleged his election according to that custom.

And in another plea he alleged—that Wycombe had been 1663. from time immemorial an ancient borough, and was, at the granting the charter of Charles II., a body corporate. He Burgesses. also set out parts of the charter, particularly the power given to the *mayor, bailiffs, and burgesses*, to elect as burgesses

* See before, p. 1769, the Newark case.

George IV. so many and such other men, inhabiting or not inhabiting*

Rex v. within the borough, as to them should seem most expedient.
Westwood That the aldermen and bailiffs should be the common council;
1829. and that the mayor, aldermen and bailiffs should have power to make "*whatsoever* bye-laws to them should seem "to be good, wholesome, useful, honest, and necessary, "according to their sound discretion, for the good rule and "government of the burgesses, artificers and inhabitants; and "for declaring in what manner and order, the mayor, aldermen, bailiffs and burgesses, and the artificers, inhabitants, "and residents of the borough, should behave, conduct, and "carry themselves in their offices, mysteries, and business "within the borough; and otherwise for the further good *and* "*public advantage* and rule of the borough, and the victualling "of the same. And also for the better preservation, government, disposition, letting, demising of lands, &c., and other "matters and causes whatsoever, touching, or in any wise "concerning the borough, or the state, right, and interest "of the borough." The plea set out other parts of the charter; averred that it was accepted; and that in 1675,

Bye-law. the mayor, bailiffs, and burgesses made a bye-law (*not now extant in writing*),† for the better rule and government of the borough, touching and concerning the election of the burgesses, for the time then to come, *in order to avoid popular confusion and disorder*‡ in such elections; whereby it was ordained, that from thenceforth, the *mayor and common council*, should at all times thereafter, *by themselves, and without the concurrence or assistance of the rest of the burgesses*,

Burgesses. elect and choose such persons to be burgesses, as to them should seem meet. Which bye-law, it was alleged, had ever since the making thereof, thitherto been constantly kept and

* This passage in the charter clearly did not mean to give the power of making and continuing as burgesses, persons not inhabiting, and altogether unconnected with the borough: for then they might have made all the people of England, as suggested in the Ipswich case:—but only that they might make as burgesses, not only those persons who had before inhabited in the borough, but also all, who though not inhabitant before, were desirous and willing to come and reside there.

† This is a legal fiction, to raise the prescription of a bye-law, and is the invention of the pleader.

‡ These expressions are borrowed from the Corporation Case.

observed by the mayor, bailiffs and burgesses, and was still in force. George IV.

The plea then stated the election of the defendants, according to the bye-law. Rex v.
Westwood
1829.

The replications and rejoinder raised other questions in this case:

But a demurrer to this third plea brought under consideration, the important question before referred to; and which formed the subject of discussion in the House of Lords.

In support of the demurrer to the third plea, it was argued on the part of the crown,

1st, That the charter having given power to make bye-laws to a select body, the burgesses at large had no power to make a bye-law.

2ndly, That a bye-law altering the mode of election given by the charter, and excluding an integral part of the corporation from voting at the election of burgesses, was bad.

Against the demurrer, and in support of the plea, it was argued for the defendant,

1st, That it was a valid bye-law, because the power given to the select body was confined only to certain matters specified in the charter; and the regulation of elections was not one of those matters.

2ndly, The bye-law does not strike off an integral part of the electors: it only confines the election to a certain number of burgesses. And the case of Corporations* was relied upon: as well as the Colchester case.†

On those points the judges differed in the Court of King's Bench in the manner stated before. The argument in the House of Lords, as well as the different opinions of the judges, were all referable to these same questions.

It remains to be considered, lastly, what are the grounds upon which the affirmative or negative of these points can be maintained.

It should be first observed, with respect to the pleadings, that they are framed to support a *usage*, which had crept into the borough, of electing the burgesses by the select Usage.

* 4 Co. 77.

† 3 Bulstrode, 71.

George IV. knowledge the right of the person who did the act ; so that
 Rex v. the acquiescence is a practical, though tacit admission, of
 Westwood the justice of the claim.
 1829.

But is this so with respect to the governing and controlling power of the corporation and the subordinate members of it ? First, the parties are not equal : the corporation has power and wealth to support its claim ; the latter probably neither. The corporation has an interest to support the claim ; the inferior body, little or none to resist it. Hence it is that we all practically know—and it has been shown in many parts of this work—that such usurpations are constantly exercised without resistance ; and the party acquiesces in them, because they are unwilling or unable to incur the expence of opposition.

The enormous costs of legal proceedings on such occasions is too well known to require minute statement. It may be only necessary to say, that the proceedings in the celebrated Chester case, cost the prosecutor many thousand pounds, and at last ended in his ruin ; and the dispute in this case, produced an expence truly appalling.

How then can usurpation in these matters be resisted ? And, consequently, how can mere usage on such questions be evidence of right ? particularly where that usage is in direct opposition to the express words of a charter so recent as the year 1663.

It is therefore contrary to the general feeling and practical knowledge of mankind, to give such general effect to usage in cases of this description. If usage is allowed to have only its fair weight in each individual case, according to the circumstances which accompany it ; and only a *primâ facie* presumption is adopted in its favour ; liable to be rebutted by any fair presumption to the contrary, then it is impossible to complain of the rule or its application. But if it is extended further, or used as in any degree conclusive, then is usage misapplied, and the experience and common sense of mankind outraged. Nor can any thing be more injurious, either to the science of law, or to the general administration of justice, than that any conclusion should

be adopted by the courts, against which the general feeling of the public is justly directed; so that the conclusions in courts of law should differ from those drawn by the public out of court; for by such means the law fails in much of its practical good, and facts are seen in different points of view by the courts and the public.

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1829.

Thus, in this particular case, the usage for the election by the select body, enabled them to subject the whole corporation to its control. The uninformed public would say this could never have been intended—they would consult the charter—it directs exactly the contrary—and the conclusion would be immediately drawn that the *usage* was *usurpation*.

On the contrary, the law says this usage is evidence of right; but the charter is against it; then something to justify this right must be assumed: in this instance a bye-law, said by the gratuitous fiction of the special pleader, *to be lost by time and accident*, must be presumed, in order that the usage may be upheld. The usage is to justify the presumption of a bye-law contrary to the charter; and the bye-law, when presumed, to support the usage. Thus, are these presumptions to move in a circle pursuing each other. The unlearned should be informed that this notion of a bye-law, lost by time and accident, only rests in the fancy of the special pleader; and no reasonable person will, for one moment, suppose that such a thing really existed, without any trace of it being left.

Having thus considered what is the real nature of this question—how the *usage* ought to affect it—and why this bye-law was imagined and alleged—it will be necessary to proceed to the abstract legal questions which arise out of the record.

For it may be said, with truth, that these observations turn, in a great degree, upon the *facts* connected with the case; but the question raised on the record by the demurrer, admits all the facts, and raises only the question of law, whether the bye-law stated in the plea (assuming it to have been made) was valid.

say

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Rex v.
Westwood
1829.

It has been seen, that, by the charter, a power of making bye-laws was given to the *mayor, aldermen, and bailiffs*; and if that clause gave them the sole power of making bye-laws, and impliedly excluded the body at large from exercising such an authority, then it necessarily followed that the bye-law set out in the plea was bad.

But it is incident to all corporations (as well as many other bodies) to make bye-laws; and *prima facie*, that power is to be exercised by the body at large. Nor, with submission to the learned judges, who stated a contrary opinion, can that power be taken from that body but by express words. There is no principle in corporation law more clear than that a select body can have no powers but such as are expressly given to it. Consequently, a power of making bye-laws, given to such a body, can only extend to such matters as are specified in the clause giving the power; and although there should be general words in such a clause, still those general words must, according to the rules of construction, be with reference to the matters included in the special words of the clause. There can, therefore, be no sound ground for supposing that general words introduced into such a special clause could have the effect of taking away, by construction, or implication, an incidental power which existed in the body at large, and which, as before observed, could not be annulled but by express words.

It is a curious feature of this case, that although the principal point led to a decision in favour of the defendant, yet there were other points, which the law adjudged against him. And so intricate and involved were the questions springing out of this discussion, that truth and law appeared on many of the points to alternate between the crown and the defendant; the worst position in which the law could be placed, and from which it could not be extricated but by simplifying the question, and by deciding it on plain and distinct principles, which might be intelligible to the public at large.

Assuming that this point could be surmounted by the defendant; and that the body at large had still left in them

a power to make bye-laws on some subjects—their general incidental power not being exhausted by the special power given to the select body, it remains to be considered, whether the particular bye-law, supposed to be made by the burgesses at large, was good and valid in law, or otherwise.

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Rex v.
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1829.

The bye-law is decidedly contrary to the charter; and it is rather a strong decision to say, that when the king has by his charter created a corporation, with a particular constitution, the body created should have the liberty of altering that constitution, provided for it by the power creating it. The mere statement of the question seems to carry its refutation along with it; and the simplest principles of reason, would appear to make the point so clear, that it required much legal ingenuity to raise the doubts respecting it.

Still less can the point be in any degree questionable, where the alteration is in so important a part of the constitution of the borough, as the limiting the persons who are to regulate the admission into the corporation.

This point has in fact, been expressly decided by the Court of King's Bench; in *R. v. Head*,* where the charter granted that the *mayor and commonalty, together with the aldermen*, might elect as many *burgesses*, as to them should seem fit, but the defendants pleaded an election by the mayor and aldermen, under the sanction of 100 years' *usage*, from which it was contended, a bye-law, pleaded as *lost by time and accident*, might be presumed; and that such bye-law, "for the avoiding of popular confusion," restrained the right of electing burgesses to the mayor and aldermen. On the part of the crown it was insisted, that this supposed bye-law—inferred only from the proof of usage—contravened the fundamental principles of the constitution of the borough; which it was argued they could not do, even by their own consent, because the king and the public were interested; and it was said, they must use the charter as the crown had given it, and they have accepted it; and that they could not make a law contrary to its intention. The

Rex v.
Head.

Usage.

* 4 Bur. 2521.

George IV. assent of the burgesses could not bind their successors, &c.—

Rex v.
Head.

And though a verdict was found for the defendant, on all the issues, the court set it aside; and directed that judgment of ouster should be given.

The judgment of the court is not stated, with any particularity in Burrow's report of the case; but in a MS. collection of corporation cases, made by Mr. Justice Yates himself, who was a great corporation lawyer, he gives the general judgment of the court, as well as his own decision, in these words—"Supposing the corporation had a power to exclude, (by any bye-law whatsoever) an *integral part of that community*, from the right of electing, it could not possibly be done by the common council alone, thus specially constituted by the charter, whose jurisdiction was only to administer the constitution, which that charter established. In the case of corporations, the common council were created by the corporation themselves, and were the *representatives* of the commonalty; and the bye-law there made for restraining the number of electors, was made by the whole corporate body. But the present bye-law can only be considered as an ordinance of the mayor and aldermen alone—"

"It is alleged to be *made* by the mayor and aldermen, then being the common council of the borough; and no further share in it is ascribed to the commonalty, than merely their *assent* to it, but *ASSENT* alone is no act of *legislation*; and (*however it might affect the individuals assenting*) cannot operate as a permanent law, upon their successors. To establish a *law*, all the integral parts of the legislative body, must positively *join* in *enacting* it, and not in assenting to it only. If those by whom a bye-law is made, have *not* in themselves a *complete* authority to make it, the whole is a nullity; and no assent of others to an act that is void in itself can ever make it valid. The present case, therefore, falls within the determination of the *King v. Spencer* (from the borough of Maidstone), and as *that will alone* be a sufficient ground for giving judgment for the prosecutor, it is unnecessary

“ to go into the general question, whether the whole corpo-
 “ rate body together could, by any bye-law, *exclude an inte-*
 “ *gral part* of the corporation from the franchise of electing.
 “ It was therefore determined, that judgment of ouster should
 “ be entered against the defendants. But as the prosecutor
 “ had joined issue upon the plea, instead of demurring in the
 “ first instance, the master of the crown-office was directed
 “ to allow the prosecutor no costs for the *trial*, according to
 “ the directions in the case of the *King v. Spencer*.”

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Rex v.
Head.

Mr. J. Yates was very clearly of opinion, “ that the bye-
 “ law suggested in the defendant’s plea would have been
 “ equally void, if the whole corporation had joined in making
 “ it. For *they have no authority to vary the constitution*
 “ *established by the charter; as it is from thence alone that*
 “ *they have all their existence. And if ever they take upon*
 “ *themselves to change it, they commence usurpers*, and are no
 “ longer a lawful society. That *the crown, which originally*
 “ *erected the corporation, could alone prescribe the mode of*
 “ *continuing it*. And any other method assumed by them-
 “ *selves would be totally unauthorized and void*. That by the
 “ charter, the mayor and *commonalty*, together with the
 “ aldermen, were to elect all burgesses. The *commonalty*,
 “ therefore, were an *integral* part of that body to whom the
 “ power of continuing the corporation was delegated by the
 “ crown. But by *this bye-law the commonalty were totally*
 “ *excluded*;* and the mayor and aldermen assumed that power
 “ to themselves, to whom no such authority was given. So
 “ *essential a variation from the charter was altogether as*
 “ *lawless as if they had set up a new corporation of their own*
 “ *creating*. And the burgesses elected by those two parts of
 “ the body, excluding the third, gained no more title by *such*
 “ an election than if they were chosen by strangers.”

Nor did this case pass sub silentio. The point was raised
 again on demurrer in another case from the same borough;
 and the Court of King’s Bench decided again as they did in
 the case of the *King v. Head*.

Rex v.
Hoblyn.

The defendant, Hoblyn, carried the question up to the

* See before the Truro and Salisbury cases.

George IV. House of Lords by writ of error: where, on his part, reliance was placed on the *usage* for a century.

Rex v.
Hoblyn.
Usage.

But on the other hand it was said, that the bye-law was the ground of that usage.

On the part of the crown it was insisted, that the bye-laws made by corporations must be consistent with, and subordinate to, their constitution under their charter. If they could make laws to alter their own constitution, the king's prerogative would be taken away and transferred to the subject.—That the power of electing burgesses and freemen of that borough, was, by the charter, expressly given to the mayor and *commonalty*, together with the aldermen of the borough. And therefore the *commonalty* was a constituent part of the body, by whom that power was to be exercised. Whereas the mayor and aldermen frankly declared it to be their purpose in the bye-law, to take that power wholly to themselves, in exclusion of the commonalty.—In this respect the bye-law was *repugnant to an essential part of the charters*, and so substantially bad, that no *usage* or acquiescence under it could make it good.

After which the judges, in answer to the question submitted to them, whether the bye-law was good or not, gave their unanimous opinion in the negative. And the judgment of the King's Bench was accordingly affirmed.

This therefore is a strong decision, after long discussion and consideration, and with the unanimous opinion of all the judges, that a *bye-law, repugnant to an essential part of the charter, was void*.

It is true, it has been contended that this decision proceeded on another ground, namely, that the bye-law was not made by the body at large, because it was only alleged to be made by the mayor and aldermen, being the common council, with the assent of the commonalty; and though they assented, that did not make them parties to it, and they might not have been summoned; but with submission it may be asked, if this is not hypercritical? It was suggested by the counsel in the argument of the King v. Head, and was adopted by the court. But surely if the commonalty as-

sented, which is what the allegation states, it must be taken that they were present, and that they were parties to it, for how could the commonalty assent without being both present and parties to the transaction? if they assented, they must have had the power of dissenting, and what is a party to any transaction, but the person who has had the power of assenting or dissenting, and has in point of fact done either the one or the other?

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Hoblyn.

A bye-law, therefore, made by the mayor and aldermen, with the assent of the commonalty, must surely be taken as meaning in substance, that it was made by those bodies. The charter gave the power to the mayor and commonalty, together with the aldermen. Suppose the bye-law had been alleged to have been made by the mayor and commonalty, with the assent of the aldermen, would not that have been sufficient, and are not the words "with the assent of," equivalent with the words "together with?" If so, where is the difference, whether it is alleged to be a bye-law made by the mayor and commonalty, with the assent of the aldermen, or by the mayor and aldermen, with the assent of the commonalty—if the one is to be considered as excluding an integral part, the other must be equally so—and then the whole resolves itself into this point, whether the words of a charter, requiring an act to be done by the mayor and commonalty, *together* with the aldermen, is not properly executed by the mayor and aldermen, with the assent of the commonalty.

After all it must be remembered, that if this is a defective allegation of the concurrence of the commonalty, it is only the error of the special pleader, who no doubt thought that he had sufficiently alleged the concurrence of the commonalty. For if he had not, he could as easily have alleged that it was made by the mayor, aldermen, and commonalty. As the bye-law is pleaded as lost by time and accident, it only remained in the imagination of the pleader to allege it as he thought fit, to support the usage. For it must ever be remembered, that this formed no essential difference in the case, but was

George IV. purely a technical distinction, founded on the slip of the
 Rex v. pen of the pleader.
 Hoblyn.

It must likewise be observed, that the other ground of objection, which is a more substantial one, was also relied upon, that the bye-law was contrary to the charter; and that, notwithstanding the Case of Corporations, from the 4 Co., was quoted.

Indeed it seems clear that Mr. Justice Yates formed his opinion on the *broad ground* that *the bye-law was contrary to the charter*, and could not be supported; for there was no authority to vary the constitution established by the charter. And in truth this seems to be the real ground of objection to the bye-law, in that case as well as in the present.

But the Case of Corporations* was much relied upon in
 Rex v. Westwood.
 Rex v. Westwood

It must be remembered, that this case was cited in Rex v. Head, and Rex v. Hoblyn, both in the Court of King's Bench and in the House of Lords; and Mr. Justice Yates expressly referred to it—qualifying, however, its application, and finally giving his decided opinion against the bye-law.

In the course of the argument of the Wycombe case, some of the learned judges observed, with respect to a dictum of Lord Mansfield, that it was extra-judicial—an allowed objection to any legal doctrine—which has been made at all times, as well by the bar as from the bench, however learned or talented the assertors of the opinion might be; or however exalted the court in which it was uttered.

Case of
 Corpora-
 tions.

Now, the first obvious objection to the Case of Corporations is, that it is extra-judicial, as shown before :† and although such a declaration of the law, if it had been founded on a consideration of former cases, would, even as an opinion, have been entitled to much consideration; still, in a legal point of view, and considering its binding effect, it is no more to be relied upon than any other legal opinion; that is, as far as it is supported by the common or statute law, or prior

* 4 Co. 78.

† See before, p. 1448.

cases, or established principles; but the opinion itself, is no part of the law of England.

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Corpora-
tions.

It is to be observed also, that the reference to the judges, was to know the law. Now, at that time, Glanville—Bracton—Britton—Fleta—Fitzherbert—The Register—Fortescue, and the Year Books to the end of Henry VIII., were in existence; besides the early statutes; the most valuable part of our early enactments. And yet, when the Council require to *know* of the judges the law, no reference whatever is made to a single authority, either of the common or statute law, to justify the conclusion at which the judges arrived. Nor has any earlier authority been since discovered or referred to—nor can any such be found; but this extra-judicial opinion is left to stand by itself upon its own merits.

Again, it must be remembered, at what time this opinion was broached. Henry VIII. had written, as we have seen, letters to some of the boroughs to return members whom he nominated; which in some cases the voters had refused to do. When the king, in order to satisfy his disappointed candidates, had them returned for places which were boroughs; but which had not returned members for a long time. Hence, many have erroneously supposed that Henry VIII. had created many boroughs;—the fact only being that he had required from the sheriffs a literal compliance with the parliamentary writ, by returning members for all the boroughs—at least for as many as he was desirous of providing candidates.

How Queen Elizabeth followed the course of her father, and the manner in which the House of Commons interfered, has been already shown, as well as the unsatisfactory manner in which the matter was disposed of by a reference to the charter—than which nothing could be more futile; because at that time there were very few charters which at all related to the election of members of Parliament; and none of those places, whose returns were disputed, in any degree affected the question.

This was no sooner effected, than the queen began to be most liberal in the grant of charters containing clauses, giving the right of election of parliamentary representatives, though

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tions.

most of the places had enjoyed that right long before ; and the charters, which were more numerous than in any other reign in our history, (with the exception of that of King John,) began with long recitals of *prescriptive* rights, said to have been previously enjoyed by the corporations, which, in most cases, were altogether unfounded in fact. It was when these proceedings had got to their height, that the opinion of the judges now under consideration, was given.

It has been seen, that the question propounded to the judges began with a recital, which corresponds, in a striking degree, with the recitals of the charters of the queen.

The question admits, that the charters up to that reign usually directed the elections to be made by the community at large ; which, no doubt, is the case with those charters which about that time specify the mode of election ; but which was not general in the earliest charters.

The question also speaks of the ancient and usual elections by a selected number—but without saying by whom, or when, or where, or how selected. The fact is, that the election of all these officers being before that time thought rather troublesome than otherwise, the election naturally devolved on those who had to transact at the time the usual business of the town, the appointment of constables, watch and ward, and election of the other officers. Hence the 12 or 24, the grand or petty juries in the town, were often found doing those acts, the others supinely absenting themselves ; and in that manner in effect delegating their power of election to those who attended ; but that implied delegation was only temporary, and for the occasion—neither binding the individuals themselves for the future, nor their successors—all being able to resume their rights at any time. The question in effect therefore was, whether that usage was good against the charter ? and the matters complained of were the popular elections contrary to these usages—showing plainly the feeling and temper of the time.

The answer of the judges is somewhat singular : “that such ancient and usual elections were good, and well warranted by their charters.” At least, it is strange, if it means

that such elections were thereby limited for future times to such select body ; and that seems to be the meaning of the answer when it is compared with the sequel. If so, then the answer is, that although the charters require the elections to be made by the whole body, a usage to limit it compulsorily to a select body, is warranted by the charter—which seems almost a contradiction in terms.

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Corpora-
tions.

If it meant, that the elections made by the small number were nevertheless good, it was perfectly correct ; because, for that occasion the absent majority had, as suggested above, impliedly delegated the minority to vote for them—which is the real effect in all instances where a present minority decide on any question—and this is the result of the St. Saviour's case.*

The answer then goes on to say, that “ in many of their charters they have power given to them to make laws,” &c. It must be observed, that the judges had not any legal mode of inquiring into the fact here asserted ; they were either told so, not in a judicial course ; or they assumed it ; be it either the one or the other, it is incorrectly stated as to the ancient charters ; few of them have any such powers—and it could only be with respect to them that the inquiry could be made with reference to the ancient usage. It is true that the charters of Queen Elizabeth usually gave the power of making bye-laws—but then the question could not have been asked with reference to those charters—because, suppose that the ancient mode of election in any place was by a select number of persons, and the queen granted a charter giving the right of election to the body at large, which charter was accepted—there can be no doubt but that such charter and acceptance would put an end to the former mode of election by the select number. The answer, therefore, could not apply to those charters : and as to the more ancient charters, it was untrue.

The answer then suggests, as the ground for reasonable restrictive bye-laws in this respect, the inconvenience of popular disorder and confusion.

* Southwark, Lane, 21.

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Corpora
tions.

This is stated to be agreeable to law; but, as before observed, no authority is given for that position.

The origin of this doctrine, is, in all probability, to be found in the preamble of the stat. 8 Hen. VI. ch. 7, as to the elections for counties, in which it is recited, that "the elections of knights of the shire have of late been made by excessive number of people, whereby manslaughters, riot, batteries and divisions had arisen." But it must be remembered, that a principle upon which the legislative power may think fit to act in framing a new law, is one thing; and the assertion of a principle of the existing law is another; and there seems no ground for saying that this principle had ever been adopted into the common law.

It was not, therefore, agreeable to the law; and that it was not agreeable to their charters the question itself submitted to the judges admits on the face of it.

It is then added, that although such ordinance cannot be shown, yet it shall be presumed in respect of such special manner of election; so that, as observed before, the usage is to raise the presumption of the bye-law; and the presumed bye-law is to support the usage.

It is said parenthetically, "which special election could not begin without common consent;"—why might it not have begun by usurpation? That is the whole question in dispute; and it is a *petitio principii* to say that it began by consent, when the question is whether it did not begin by usurpation.

But, it will be said, usurpation is not to be presumed: but even were that to be conceded, was it not, at least, a sufficient *primâ facie* proof of usurpation that it was against the charter.

It is then added, "such reverend respect the law attributes to ancient and continual allowance and usage." And such respect will ever, on all proper occasions, be given to usage; because it tends to quiet men's possessions, and to put an end to disputes. But this is where there is nothing shown to the contrary. Usage then should prevail. But it is merely a presumption, and continues only *donec probetur in contrarium*. And it can have no place where the charter of the crown, in whom the power of making the law for the

corporation, is to the contrary, is vested : and where the acceptance of that charter conclusively binds the grantees. To let in usage as a rule in such a case is to raise disputes instead of allaying them—is to introduce uncertainty instead of removing it—and makes the words of the king, and the acts of the parties, inoperative and useless.

George IV.
Case of
Corpora-
tions.

The conclusion that the usages have been so in London is not true ; for there the elections at that time were by the body at large—the *householders* in the wardmotes, and the *freemen* in the common halls.

In conclusion, Lord Coke says, “ all which the law has “ provided, as appears by this resolution ”—which, undoubtedly, is a strange sum of the whole : because it is difficult to understand how the law could have well provided a thing, against which no single principle, case, authority, or dictum is quoted. Nor is it very obvious how the conclusion is arrived at, that it appears from the resolution that the law had ever provided it ; because the experience of the past, could hardly be proved merely by the act done at the time. The resolution might prevent the assumed evil for the future, but would not prove that the law had done so before.

It is true that there are some authorities for this decision quoted in the margin. The first is Davies, 44, 6, where the celebrated subsequent case of Tanistry, in the second year of King James's reign, is reported. But all there stated is, that “ ancient grants have always a favourable interpretation “ according to usage and allowance ; ” which is beyond all question. Whenever there is a doubtful expression used, *usage* must afford the interpretation of it.

The next, which is the St. Saviour's Southwark case,* is not an authority on the point, but only establishes that a minority of persons shall bind a majority wilfully absent.

The next, Jenkins' Centuries, 273, is only a repetition of this same resolution. And therefore adds nothing to the supposed authority of it. Indeed, by the principles which are stated by the learned judge, at the close of that case, he defines what is the proper effect of *usage*. He says, that Usage.

* Lane, 21.

George IV. "from length of time all things are presumed to be properly done: that usage countervails an unwritten law (which clearly cannot apply to a charter) if the usage be special; and interprets an unwritten law; if the law is so general as to stand with the custom—that is, if the custom and law are not repugnant." And inasmuch as in the case under discussion, the charter and usage were repugnant—these principles did not apply, but on the contrary, excepted that case.

Case of Corporations.

Colchester case. The *Colchester case*, in Bulstrode, p. 71,* has also been much relied upon, and, is like the Case of Corporations, deficient in one most material point affecting the present inquiry. It does not say distinctly that although confusion is bad, and they might, therefore, alter the mode of election, that they might do so for more than that occasion pro hac vice, so as to bind those only who assented to the alteration—leaving in doubt the important point whether such an alteration would bind their successors. It is clear that the passage was to be qualified in some manner, because it closes with the words, "and not otherwise;" and it does not exactly appear to what branch of the sentence these words apply; so that its meaning is very doubtful. It must also be remembered, that in the case supposed it speaks only of a popular election, not saying that it was required by the charter; and therefore it might be only a popular election, as proved by former usage, which, upon the principles quoted by Jenkins, might be countervailed by a later usage. Indeed, this seems to be the obvious meaning of the case, because it goes on to make an exception, "if the charter requires the election to be made by all;" for it says, "But if *by their charter* they are to be elected by them, *then this is not to be altered.*" It is true it goes on to add, "but by and with the general assent of the whole town, and so by this means to take away confusion." But this is the same as was asserted just before; and it makes no exception with reference to charters; but puts them on the same footing as the elections mentioned before; so the exception is stated to be the same as the rule, which is absurd; and consequently there must

* See before, p. 1517, 1518.

be some error or alteration, either by interpolation or omission, in the text, which makes this case, as well as that in 4 Co. by no means safe authorities, on which to found a doctrine so contrary to reason and principle, as that *the created can alter the law imposed upon it by the creator*; or, in other words, the grantees of the crown alter by bye-laws the constitution which the king has prescribed for them. If the chance of popular confusion was to be taken into the account before the charter was granted, the king had the opportunity, and must be presumed to have availed himself of it. If, on the contrary, the popular confusion arose subsequently to the granting the charter, then the rule which had been laid down must be altered by the same power and means by which the rule itself was made, namely, by the king's grant, accepted by the burgesses, "*and not otherwise.*"

George IV.
Colchester
case.

The only remaining case cited in the margin, is that of Hobart 15, in which there is nothing bearing upon this point.

It was, however, said that this Case of Corporations had long been acted upon. Admitting that to be true, still it has often happened, that authorities of even longer existence than this, have after more mature consideration been overruled, when they were found to be either of no authority, or against principle. It has been attempted to be shown, that this case is defective in both those points.

Case of
Corpora-
tions.

But the truth is that it has been very little acted upon;—has even been doubted as an authority; and in the margin of the report itself, the point supposed to be decided by it, is stated with a query.

The Case of Corporations therefore, not being a legal authority; and for the reasons suggested, not supported by principle or prior decisions; it may be allowable, with all proper respect to the august tribunal before whom it was discussed, to question the propriety of that decision, which was in a great degree founded upon it.

It was justly observed by Lord Mansfield, as quoted before, that in matters connected with corporation or municipal law, certainty is of the greatest importance. And

George IV. therefore where there was so obvious a ground of decision, supported by numerous authorities—that the usage which had prevailed in the borough of Wycombe, being contrary to the charter, could not be supported—it seems extraordinary that a plain course, which would have been intelligible to every capacity, should have been abandoned; and the intricate and unsatisfactory discussion of subtle points substituted in its stead.

**Case of
Corpora-
tions.**

The only real fact in the case was, that there had been a *usage* for the select body to elect;—but that usage was contrary to the charter, and therefore void in law.

However it was made the ground upon which a lost bye-law was to be presumed. How with propriety, could a lost bye-law be founded upon the evidence of a usage that was, upon the above principle, illegal? But it was assumed to have existed in fact; and being so, it led to the strictly technical question, whether a power of making bye-laws, being given to a select body, an inherent power still remained in the body at large, to make bye-laws, which power could be presumed to have been exercised, as the foundation of the usage which existed.

How unintelligible these minute distinctions must be to the public, it is unnecessary to observe!

The only practical remark necessary to be made, is, that these nice distinctions were unnecessarily resorted to; and all the difficulties of the case might have been avoided by adhering to the plain and intelligible rule, which would have superseded all the subsequent astute reasoning—that *no usage could prevail against the express words of the charter*.

That principle adhered to, there would have been no ground for the presumption of the bye-law; and the decision would have then been intelligible to the parties concerned, and the public.

IRELAND.—DROGHEDA.

1769. The jury found by special verdict, that by charter and ancient custom and usage from time immemorial, hitherto used in the town of *Drogheda*,* the *sons* of freemen of the

* 9 G. III. Mic. T. B. R. Ireland.

town, were by their birth, and other persons having served a legal and accustomed *apprenticeship* of seven years to any trade, to any freemen of the said town, were by their apprenticeship, entitled to be admitted and sworn freemen of the town, and to enjoy all the liberties, privileges, and franchises to the place and office belonging.

George IV.

Birth.

Apprenticeship.

DUBLIN.

The same appears also to have been the usage in *Dublin*,* 1826. though subject to some qualification; and it is to be feared that the reader will consider from the following extract, that the intricacies which had intruded themselves into the doctrine of corporations in England, had also extended themselves to the sister kingdom.

It has been lately pointed out, that in the *Steining* case, the committee properly rejected the connexion of the guilds with the municipal body; and it will be seen in this case relative to Dublin, that the same untenable doctrines of corporations by *prescription* were maintained in Ireland as in England. It was alleged that Dublin was a corporation by *prescription*—which can unquestionably be proved to be inaccurate.

The following is the substance of the marginal note.

A writ of mandamus, directed to the corporation of *Dublin*, to admit Edward Adcock a freeman, stated a custom, "that every person, being of the age of 21 years, and a *son* of a person who was a *freeman* of the corporation, and a freeman or freebrother of one of the minor guilds, at the time of the birth of such son, hath a right, in respect thereof, to be admitted and sworn a freeman of the corporation of Dublin." The return stated, "that it was a corporation by prescription; that every person who was the *son* of a person who was a freeman of the corporation, and a freeman or freebrother of one of the minor guilds, at the time of the birth of his son, must, before he can, in respect thereof, be admitted and sworn a freeman of the corporation, &c., have been approved of by the two

Son.

* *Adcock v. the Lord Mayor of Dublin, &c.* Batty's Rep. 628.

George IV. “branches of the corporation—that is to say, the lord mayor, for the time being, and aldermen, and the sheriffs, for the time being, and the commons, sitting in different apartments at an assembly of the corporation called a quarter assembly, notwithstanding that such person, the son of a freeman, may be himself a freeman or freebrother of one of the minor guilds.” It then stated a custom, that the person applying for admission should present a petition to each branch of the corporation, who had exercised a discretionary right of complying with, or refusing the prayer of such petition, without assigning, or being required to assign any reason; and that the opinion of the sheriffs and commons on such petition should be taken by ballot only; and that without such approval no person had been admitted a freeman; and that a petition was presented by Edward Adcock to the lord mayor and aldermen at a quarter assembly, which they rejected; wherefore, the corporation could not admit him a freeman. It was held (as to matter of form)—1. That the return was not argumentative, and was to a certain intent in general, which was sufficient; and that as it did not negative the right claimed in the writ, but admitted it, subject to a qualification, it was unnecessary that it should traverse the right as stated; and that for the same reason, the supposal in the writ was sufficiently answered, it not having been controverted, but merely qualified.

2. That it appeared with sufficient certainty in the return, that E. A.’s petition was rejected by virtue of the custom therein stated, and at the same quarter assembly at which it was presented.

3. That it was unnecessary that the return should negative the right of E. A., as being 21 years of age.

As to matter of substance. It was held, that the custom that either branch of the corporation might, without assigning any reason, reject a petition for admission to freedom, was not unreasonable and void upon the ground of its involving a *capricious right of rejection*, or its being contrary to public policy, or its savouring of arbitrary power.

Secondly, it was held, that the custom to reject or elect by George IV.
ballot was not unreasonable or void."

The principal error in this case appears to be founded on the assumption, that Dublin was a corporation by *prescription*, without which, the usages that are alleged could not be supported. And certainly it is a strong assumption to presume, that the election by ballot has existed so long, that it could be attributed to immemorial custom.

The discretionary power asserted in the mayor and burgesses, is undoubtedly founded in law, because they always were intrusted from the earliest times, and ought to be so still, with the power of saying whether each person who claims to be a burgess is fit and proper by condition, station, and character to be placed in that situation.

In that form, and in that form only, can this power be reconciled with the law.

SLIGO.

Another case occurred in Ireland two years before the 1824.
preceding, in which the same species of doctrine which has been adopted in England with reference to the right of the *inhabitants*, was also extended to Ireland. And, it seems, with the same disregard of the ancient law and the principles which were applicable to municipal bodies. Nor can it be considered, that independently of *usage*, there is the slightest difficulty in construing the words of the charter. The decision therefore, in truth, proceeds upon the *usage*; the value of which must depend upon the means or opportunity which the inhabitants had of enforcing their individual rights, and the inducement they had to do so. Besides which it is to be considered, that, strictly speaking, the admission of some of the burgesses only, does not prove that the others were not entitled. In truth it is not affirmative usage, but negative non-user which is relied upon; the whole substance being that no inhabitant who has not been admitted, has insisted upon his right. What evidence is there to show that he wished or desired it? or that any person had been impro-

* *Rex v. Attwood*, 4 Barn. & Adol. 481, when it was said, that the election

George IV.

1824.

perly excluded? because, from the very reason and nature of the thing, as well as from positive law, and the whole tenor of our institutions, it is clear that there was some discretion in the mayor and burgesses; and that they were not bound to take every man, but only such as from condition, station, and character, were honestly and conscientiously fit to be admitted. The *usage*, therefore, is not of that great weight which seems to have been assumed; and when opposed to the plain words of the charter, it appears incredible that a doubt should have been entertained upon the subject.

The words are, that "all the inhabitants shall be a body corporate." Who could accept that charter? Who were the persons to whom it was granted? When they came forward to accept it, who could say to any inhabitant, except those excluded by the law (as women, peers, ecclesiastics, minors, felons, &c.); that they should not accept it? Who could presume, contrary to the words of the king's charter, to make any election or exclusion?

The real construction of the clause giving a discretion as to admission to the provost and free burgesses is, that they are to exercise that discretion according to the law, with reference to the condition, station, and character of the party, and not arbitrarily or capriciously.

The former construction is equally as consistent with the words of the charter as the latter. And one is consistent with law and reason; the other opposed to both.

Who will say that the latter was the intention of the crown? Who will say that the king's charter was intended to support arbitrary and capricious selection—to generate dissatisfaction—to rouse jealousies—to create disunion? If the rejection is to be founded upon cause, then all these objections are removed, and the charter of the king is just, reasonable and wise. It appears impossible to doubt upon the construction.

Son

The claim as the *son* of a freeman, being a branch of the ancient common law, is equally applicable to Sligo, as to from the particular body might have been made in every instance by choice, and not under any rule.

any other place; but in fact, for the reasons given before, ^{George IV.} it is not at present properly applicable to any. _{1824.}

The following is an abstract of the case :—

In the case of the King v. the Provost, Free Burgesses, and Commonalty of the Borough of Sligo.* It appeared that James I., in the eleventh year of his reign, incorporated the town of Sligo, and in the charter were the following clauses : 1824.
 “ Quod infra burgum prædictum sit unum corpus corporatum et politicum, consistens de uno præposito, duodecim liberis burgensibus, et de communitate. Et quod *omnes inhabitantes* infra prædictam villam, et terras prædictas, de cetero in perpetuum sint, et erunt vigore præsentium unum corpus corporatum, &c. per nomen Præpositi, Liberorum Burgensium, et Communitatis Burgi de Sligo. Charter. 1613.

“ Ac *omnes inhabitantes* villam prædictam, et totidem tales alios homines quos præpositus et liberi burgenses ejusdem burgi, pro tempore existentes, in libertate burgi prædicti admiserint, volumus, constituimus, et ordinamus fore et esse de communitate burgi prædicti.”

The charter then provides for the election of the provost annually “ de discretioribus liberis burgensibus,” and for the election of the free burgesses, “ de melioribus et magis probioribus inhabitantibus *burgi* prædicti.”

The plaintiff being desirous of being admitted to the freedom of the borough, presented a petition to the provost and two burgesses, claiming it upon two grounds : Petition.

1st, As being the *son* of a freeman.

2ndly, As an *inhabitant* of the borough.

The application was refused by the provost, &c., who also made an affidavit that he had examined the corporation books, with a view of ascertaining “ whether any right existed derived from any usage or custom of the borough, entitling persons, by virtue of residence or inhabitancy, to demand as of right their freedom within the borough; and that there was not a single precedent which he had been able Affidavit.

* 2 Fox and S. 96.

George IV. "to discover in the books of any such admission, or even of
1824. "any claim of such a right."

The affidavit then states, that there was no usage or custom entitling persons as of right to the freedom of the borough, as eldest *son* and heir at law of a freeman; and that the borough of *Sligo* was not a corporation by prescription, but derived all its franchises and privileges under the charter of James I., by which it was incorporated.

For the
Rule.

The counsel in support of the rule contended, that Sligo not being a *borough* by prescription, but by charter, no question of usage could arise, but the case ought to be decided on the construction of the charter.

That the plaintiff claimed to be admitted to the freedom as an *inhabitant*. The charter having expressly recited that it was granted, on the petition of the *inhabitants*, and for the purpose of *encouraging settlers*. But if nobody had a right but those capriciously chosen by the provost and the free burgesses, the object would be defeated. That unless "*omnes inhabitantes*" mean "some inhabitants," his claim could not be defeated.

That with respect to the clause, defining who the commonalty should be; it would be relied on that the antecedent to "*quos*" is "*omnes*," but that was neither a grammatical, nor a true construction, as the word "*all*" would not have been used, if selection had been intended; and "*quos*" must refer to the last antecedent "*alios*;" which would confine the elective power of the provost and burgesses, to those who were not inhabitants. If the antecedent to "*quos*" be "*omnes*," the provost and burgesses would have been appointed before an integral member of it was called into existence, for there would be no commonalty, until an election took place.

But if it be held that the commonalty consists of all the inhabitants, and that the power to be elected, is confined to the *alios homines*, not inhabitants, the construction would be grammatical, and the object of the inhabitants attained.

As to the annual election of the provost, the free burgesses

would naturally be elected from the commonalty; and the provision of the charter can only be consistent with the construction, that the "commonalty" was to be composed of *all the inhabitants*. George IV.
1824.

The learned counsel then concluded his argument, by citing the English statute of the 43rd Elizabeth, c. 2, *Rex v. Nicholson*,* to show that the meaning of the word "inhabitant" did not extend to all dwelling in any shire, but to such only as be resident householders; and that although usage might be of use in interpreting an ambiguous charter, it could not be relied on where the meaning was plain and clear.†

The counsel in reply, urged the case of the *King v. Chester*,‡ in which Lord Ellenborough said, that "the court would not interfere against a long continued *usage*, upon the words of a charter which were in any degree doubtful." That the usage in this case had been uniform against the claim to the freedom of the borough as an inhabitant; and the utmost that could be said of the Sligo charter was, that its construction was doubtful. Against
the Rule.

And that in the clause of the charter which describes who shall be the commonalty "quos," may be referred both to "omnes" and to "totidem alios." Also words of restriction were not necessarily confined to the last antecedent connected by the word "and."||

The learned counsel further urged, that the usage had been uniform, and not inconsistent with the words of the charter. That in the case of the *King v. Chester*, the usage had not been uniform, and yet the court would not interfere. If by this charter, an *inhabitant* is entitled, as such, to his freedom, he would not lose it, having ceased to inhabit; and it never could have been the intention, that when a person had inhabited, for perhaps a year, that at the end of 20 years he might claim the freedom of the borough.

That with respect to the argument, "if the first inhabi-

* 12 East, 342.

† 2 Inst. 703.

‡ *Rex v. Grosvenor*, Cases temp. Hardw. by Ridgway, 41. § 1 Maule & S. 103.

|| *Thelluson v. Woodford*, 4 Ves. 330.

George IV.
1824.

tants of Sligo were not the commonalty, this anomalous consequence would have followed, that the corporation would have existed without one of its integral parts"—which was answered in Viner's Abr. tit. Corporation, a 1, pl. 14.—where it is laid down, that "a corporation may be with a head, or without a head, and the head and members may be appointed after the foundation, and the foundation may be before any material fabric is erected."

The roll of charters has been examined, and corresponds generally with this; and the usage has been the same in every corporation in which the commonalty has been created by the same words.

Bushe, Chief Justice.—The plaintiff's claim rests upon *inhabitaney*; but there has been no instance of such a claim succeeding: on the contrary, from the foundation of the corporation by the charter of James I., the freemen have been uniformly elected by the provost and burgesses.

There are passages in the charter not free from obscurity, but none incapable of a construction consistent with the uniform and ancient usage; and as other charters, some in the same, and others in nearly the same words, have been acted upon uniformly in the same manner—the court will not encourage by its order the agitation of a question which has been so long settled by usage; and by so doing, we adopt the decision of the Court of King's Bench, in England, in the *King v. the Mayor and Citizens of Chester*.

"In support of the claim of *inhabitaney*, some passages in the charter are relied upon.

"The first is, that in which it is declared that within the borough there is to be one body corporate and politic, consisting of one provost, 12 free burgesses and commonalty, and that *all the inhabitants* within the town and lands shall be one body politic, &c.

"Now this only means, that all the 'inhabitants' shall be incorporated by that name; but it no more means that all the inhabitants shall be the commonalty, than that all the inhabitants shall be the provost and free burgesses—which would be absurd, and yet equally warranted by a strict con-

struction of the words ; that passage, in fact, only designates George IV.
the name by which the inhabitants when incorporated shall 1824.
be known.

“ The next passage is that in which, after appointing the first provost and first burgesses by name, the charter proceeds to describe who shall be the ‘commonalty,’ in these words : ‘ And all the inhabitants of the said town, and as many other ‘ as the provost and free burgesses of the borough for the ‘ time being, shall admit into the liberties of the borough, ‘ we will, constitute, and ordain, shall be of the commonalty ‘ of the borough.’ The argument of the prosecutor upon this passage has turned upon a grammatical subtlety. It was said first, that the description of those who were to be admitted (*quos* in the Latin), must be confined to the *totidem alios*, that is, the strangers who are there made admissible, because it would be a solecism to use the universal word, ‘*omnes*,’ and afterwards to qualify it by a word which means not all, but some. But this is a mistake ; and it is agreeable to the idiom, both of the Latin and English language, to reduce the meaning of a comprehensive term by a subsequent qualification. It was also said that the word ‘*quos*’ must be referred to the last antecedent ; but it is an answer to that to say, that a relative may be governed by two or more antecedents, and that no mode of speech is more common or correct. It is not necessary to carry the observations on this passage further than to say, that it is capable of an interpretation consistent with the usage.

“ There is more difficulty,” continued the Chief Justice, “ in dealing with another passage in the charter, which, after providing for the supplying vacancies in the office of provost out of the burgesses, provides for filling up vacancies among the burgesses out of the *inhabitants* ; which at first seems as if the eligible body must go beyond the commonalty, if all inhabitants are not the commonalty ; but to this it is an answer to say, that the eligible body is not necessarily to be confined to the members of the corporation, but may be extern to them ; and that if it were so confined, it would be a reasonable construction to say, that the meaning was to

George IV.

1824.

exclude such strangers as had been admitted into the commonalty, from being burgesses, and to read the passage thus:—that the vacancies amongst the burgesses should be filled up from such of the commonalty as are inhabitants, and not strangers. That construction is not forced, and is supported by the uniform usage.”

It is useless to comment upon the grammatical and critical arguments founded upon the precise words of the charter; but the position—that if an inhabitant was entitled to his freedom, he would not lose it, having ceased to inhabit; and that it could not have been the intention, that a person having inhabited for a year, might at the end of 20 years, claim the freedom—seems to have proceeded upon a forgetfulness of the general law upon this subject. The term “*freedom*,” seems to have been used without considering at the moment, its real import. It relates, as all the documents have shown, to freedom or free condition under the common law—that once obtained, could certainly never be lost; but if a person, in consequence of his being an inhabitant householder, was

Burgesses,

entitled to be one of its *burgesses*, upon quitting the place, he would lose that title, and cease to be a burgess: but if he should return to the place, and become again an inhabitant householder, then he would be entitled to be a burgess again; whether his absence had been long or short; and what is there unreasonable in that state of things, or inconsistent with the probable intention of the crown?

The Chief Justice apparently relied upon the uniform elections of the provost and burgesses; but that is equally consistent with either view of the charter. There is no doubt they were to elect, the question does not turn upon that point—but upon whether they were to elect arbitrarily and capriciously, and reject without cause—or whether they were to elect according to the condition, station and character of the applicant.

With this case therefore, the observations upon Ireland may be concluded, as they were begun, with the assertion, that “their municipal institutions were of the same origin, and had the same object and effect as those in England; and all the legal principles and reasonings are equally applicable to both.”

LONDON.

The following case was decided in England, upon the question of the fitness of an individual to fill a municipal office, with reference to the facts connected with him, upon an inquiry by witnesses ; and not according to any arbitrary or capricious grounds.

To a *mandamus* to the lord mayor and aldermen of *London*,* to admit and swear an individual to the office of alderman, they returned, that the court of *mayor and aldermen* had from time *immemorial*, the authority of examining and determining whether or not any person returned to them by *the court of wardmote*, as an *alderman*, was according to the *discretion* and *sound consciences* of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein ; and that it was a necessary qualification of the person to be admitted to the *office of alderman*, that he should be a *fit and proper* person to *support the dignity, and discharge the duties of the office* ; that the party in question having been returned to them by the *court of wardmote* as duly elected, a petition by persons interested in the election was *presented* to them, charging circumstances which rendered him an unfit person to be *admitted to the office of alderman*—that they took the petition into consideration, and having heard witnesses, did adjudge according to their *discretion and sound consciences*, that he was not a person fit and proper to support the dignity and discharge the duties of the office.

1833.

It was *held*, that the *custom* set out in the return, was *good* and valid in law : and that as the fitness of the person to be admitted was to be determined according to the *discretion* of the mayor and aldermen, it was sufficient for them to state in the return that they *had exercised their discretion*, and adjudged the party unfit, without giving particular reasons.

* 3 Barn. & Adol. 255.

SUDBURY.

The following case should also be added,* as convincingly establishing how little justified Dr. Brady was in founding his argument upon the assumption that burgesses in the Banbury charter meant capital burgesses. The decision of the King's Bench being directly to the contrary.

By charter of Car. II. there was to be in the borough of Sudbury a mayor, aldermen, and twenty-four capital burgesses. On the death or removal of an *alderman*, the mayor and aldermen, or the greater part of them, were to elect a capital burgess to supply his place: when a *capital burgess* died, &c., the mayor, aldermen, and other capital burgesses or the greater part of them, were to elect a successor among the *inhabitants and burgesses*: and the mayor was to be annually elected on a certain day "by the burgesses of the "borough, or the greater number of them," with the consent of twenty-four freeholders and inhabitants, to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter day in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended.

It was *held*, "that this did not avoid the election, for that the word '*burgesses*' in the charter (where it treated of the election of mayor) *could not be construed to mean only capital burgesses*; that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere;† and that the CAPITAL BURGESSES, in electing the mayor, *acted in the CAPACITY OF BURGESSES MERELY*."

* The King v. Goldsmith, 4 Barn. & Adol. 835.

† Banbury Case, 1689.

WILLIAM IV.

Notwithstanding the parliamentary franchise forms no part of our inquiry, it is impossible to close this work without a reference to one portion of it which is materially connected with the due formation of the *lists* of the *burgesses*. A mode of framing the list of the voters has been established by the act of the Legislature, and had experience proved the practical utility of that system, it would be expedient to abide by it.

But without any disposition needlessly to censure or complain, it is impossible not to say that a more imperfect plan has rarely been suggested ; and it is not immaterial to add, that it has been accompanied with no small portion of expence.

There can be no doubt but the gentlemen who have been appointed to superintend the formation of these lists, have done all that knowledge, talent, and zeal could effect in the undertaking ; and have by their intercourse with the conflicting parties tended in a great degree to lessen the virulence of election disputes. But it was impossible to do more than was effected by the imperfect means placed in their hands.

The real defect in the system is, that it was intended merely to form a *list of voters* ; which had never before existed in this country—and, it is believed, in no other till a very recent date.

Before this experiment was tried, the conflicting motives of privilege and burden operated upon the lists which were formed, from whence the voters were ascertained :—as the land-tax assessments—the poor-rates—the entries of freemen—for which service had been performed, or some expence for stamps or otherwise had been incurred. And a variety of considerations induced those who made the lists to endeavour to form them as perfectly as possible. On the other hand, it was the immediate interest of the person, who

Will. IV. was charged, not to incur the expence if he could legally avoid it. But in the present mode it is not the interest of any person to take care that the lists are correct—the time at which they will be brought into action is uncertain—those who form them are totally indifferent to the subject, and have neither inducement nor knowledge enough to make them complete or systematic.

On the other hand, in some particular places, when a temporary excitement happens to exist, an unusual effort is made by partisans to crowd upon the register as many votes as can be placed there; or to embarrass the inquiry with as many objections as can be suggested—whilst in other places, the utmost indifference prevailing, the omissions are numerous, and often of those who would be most qualified to give a discriminating vote.

In truth, after a short time, it is obvious that the lists will be altogether under the control of active agents.

To those who have had an opportunity of witnessing the operation of this system, it must be known, that more imperfect lists of the voters have never been found than since it came into action.

But it is not our province to suggest alterations or corrections in this respect—it is sufficient to say, that it is not a system which holds out any inducement to carry it further—but affords a strong reason, as far as the municipal institutions are concerned, to look for some better method of ascertaining the *burgesses* in the boroughs.

The errors to be avoided are those of merely making a list of burgesses, without the self-acting and correcting principle of opposing interests, resulting from the possession of privileges, and the imposition of burdens. And the other of making lists for any temporary purpose, instead of framing them with the intention of their being permanent and continual. Not only are these principles clear, but, fortunately, the mode of carrying them into execution is distinctly pointed out by the law; and can be effected in a form and manner particularly acceptable to the people. For by the old law the list of persons who were to enjoy the municipal privileges was

made in the *public court of the people*; in the presence of all the *inhabitants*; under the sanction of a *sworn judge*: and regulated, and corrected by the decision of a *jury*. And the list so formed remained as the permanent record of the *burgesses* of the place, entitled to all the privileges, but subject to all the burdens; and liable to be called upon at all times, as well for the exercise of franchises, as for the discharge of duties. Will. IV.

Such is the plain, simple, public, and inexpensive mode of forming the lists which the law prescribes—reason sanctions—and practice would easily execute. And it is no small recommendation of such a system, that it will not be under the control of agents or others, but will in fact be executed by the people themselves, in their proper turn and rotation, which will be the surest guard against all mal-practices or improper conduct.

Another reform, probably as great as any effected in the English law at any period of our history, has been worked during this reign, by the passing of an act for shortening the time of *prescription* in certain cases. Prescription.

It recites, that time immemorial was by the law of England, in many cases, considered to “include and denote the whole “period of time from the time of Richard I. :” which seems to be but an imperfect mode of describing that rule of law which was created by statute; viz. that although the law generally required the production of written charters and documents as evidence of legal title, yet, in certain cases, rights which had been enjoyed in the reign of Henry II. should be still enjoyed, without the production of any charter to support them: which is the real foundation of the doctrine of prescription.

It is necessary to mention this statute, that so great a reform may not appear to have been altogether overlooked; but it is not requisite to add any other observation respecting it, as it does not affect the present inquiry.

The only remaining public fact necessary to be noted, is Commission.

Will. IV. the *Commission* which his majesty was advised to issue for the purpose of obtaining information respecting the condition of the municipal corporations in the country.

Commis-
sion.

Serious doubts were entertained by many, best informed upon these subjects, as to the legality of the commission.*

Preroga-
tive.

That the king, by virtue of his prerogative, is enabled, as a part of the executive functions of the crown—and constitutionally speaking, is bound—to superintend the due execution of the law in the several municipal institutions of the country, cannot be doubted. And that for such purposes, an *oath* might perhaps be ordered to be administered, in order to obtain the most correct information. But whether the crown can with propriety investigate the finances—or inquire into the property of the corporations—who are its grantees—is a question involved in great and serious difficulties. The cases cited in the note, may supply the curious reader with the means of investigating that point, if it should be thought necessary.

Oath.

But comparatively speaking, it is now become of little importance. The commission has executed its functions: and the generality of the corporations, much to their credit, and consistently with their honour, have submitted to an investigation which has in most instances relieved them from suspicion and jealousy.

The public wait the result of the inquiries of the learned commissioners.

Whatever may have been the question respecting the legality of the commission, its fruits only now remain to be received.

If the inquiry should have led to a full investigation of the history of all the municipal institutions, and tracing them from their earliest origin, should have pursued them through their course of good and evil; and distinguishing their rights from their usurpations, should afford the Legislature the means

* 1 Bl. Com. 280; 1 Inst. 96 a; F. N. B., p. 262; F. N. B., 111 d; F. N. B., 114 c; 4 Inst., cap. 28, p. 162; Stat. Westm. 2, cap. 29, 13 Edward I.; Stat. 24, Edward III.; 2 Inst., p. 50, 18 Edward III.; Stat. 2, cap. 1; 2 Inst. 479; 2 Inst. 48.

of supporting the former and correcting the latter, the public will owe a debt of gratitude to those who have effected so important a purpose. Will. IV.

But if the indiscreet zeal of party feeling shall have obtruded upon them only frivolous complaints of the present state of the corporations, or the past application of their finances, so as to have induced them to embody in their report, local prejudices and jealousies—such a course may go far to counteract that conciliatory spirit so generally displayed by the corporations during the late inquiry: which holds forth the strongest guarantee for their co-operation in the reform of their abuses—an object so essential to the permanent interests of the bodies themselves and the community at large.

That all may unite in so desirable an effort is fervently to be wished. The course to be pursued is plain and obvious. Every means should be adopted to uphold and maintain, with general concurrence, the authority and government of the *local jurisdictions* of the boroughs: and to abate, with unsparing vigour and honest determination, every abuse and usurpation.

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LISTS

OF

BOROUGHs, BURGESSES, AND CHARTERS.

I.—A LIST of the BOROUGHs or BURGESSES mentioned in DOMESDAY, in the several Counties, in the order they are entered.

KENT.—Dover, Canterbury, Rochester, Sandwich, Romney, Hythe, Seselstre, Fordwich.

SUSSEX.—Chichester, Lewes, Hastings, Steyning, Arundel, Pevensey.

HAMPSHIRE. — Winchester, Christchurch (Thuinam), Stockbridge (Somborne), Southampton (Hampton).

BERKSHIRE.—Wallingford, Reading.

WILTSHIRE. — Malmesbury, Warminster, Wilton, Bradford, Calne, Sudtone, Bedwin, Devizes (Theodulveside), Cricklade.

DORSETSHIRE.—Dorchester, Bridport, Wareham, Shaftesbury.

SOMERSET. — Milbourn Port, Ilchester, Bath, Taunton, Langport, Axbridge.

DEVONSHIRE. — Exeter, Barnstaple, Okehampton, Totness, Lidford.

MIDDLESEX.—London (burgesses once).

HERTFORDSHIRE.—Hertford, St. Alban's.

BUCKINGHAMSHIRE.—Buckingham.

OXFORDSHIRE.—Oxford.

GLOUCESTERSHIRE. — Tewkesbury, Gloucester.

WORCESTERSHIRE.—Worcester, Wick (Droitwich).

HEREFORDSHIRE.—Hereford.

CAMBRIDGESHIRE.—Cambridge.

HUNTINGDONSHIRE.—Huntingdon.

BEDFORDSHIRE.—Bedford.

LEICESTERSHIRE.—Leicester.

NORTHAMPTONSHIRE.—Northampton

WARWICKSHIRE. — Warwick, Tamworth.

STAFFORDSHIRE.—Stafford.

SHROPSHIRE.—Shrewsbury.

CHESHIRE.—Chester.

NOTTINGHAMSHIRE.—Nottingham.

DERBYSHIRE.—Derby.

YORKSHIRE.—York.

LINCOLNSHIRE.—Lincoln, Stamford.

ESSEX.—Maldon, Colchester.

NORFOLK.—Yarmouth, Norwich, Thetford.

SUFFOLK. — Ipswich, Sudbury, Dunwich, Eye.

II.—A LIST of BOROUGHs *not* mentioned in DOMESDAY, and the period when they first appear as BOROUGHs.

BEDFORDSHIRE.		DEVONSHIRE.	
Dunstable . . .	1100. 1 Henry I.	Ashburton . . .	1297, 26 Edward I.
BERKSHIRE.		Berealston . . .	1584, 27 Elizabeth
Abingdon . . .	1551. 1 Mary.	Bradninch . . .	1312, 6 Edward II.
Windsor . . .	1267. 12 Edward I.	Crediton . . .	1306, 35 Edward I.
Newbury . . .	1301. 30 Edward I.	Dartmouth . . .	Henry III.
BUCKINGHAMSHIRE.		Exmouth . . .	1340, 14 Edward III.
Agmondesham . . .	1299. 28 Edward I.	Fremington . . .	1332, 6 Edward III.
Aylesbury . . .	1555. 2 Ph. & M.	Honiton . . .	1299, 28 Edward I.
Marlow . . .	1299, 28 Edward I.	Lidford . . .	1301, 28 Edward I.
Wendover . . .	Henry III.	Modbury . . .	1360, 14 Edward III.
Wycombe . . .	1236, 21 Henry III.	Plymouth . . .	1297, 26 Edward I.
CAMBRIDGESHIRE.		Plympton . . .	1199, 1 John.
University of Cam- bridge . . .	1603, 1 James I.	South Moulton . . .	1301, 30 Edward I.
CORNWALL.		Tavistock . . .	1325, 19 Edward II.
Bodmin . . .	Henry III.	Tiverton . . .	1615, 13 James I.
Bossiney . . .	Henry III.	Torrington . . .	1301, 30 Edward I.
Callington . . .	1583, 27 Elizabeth.	DORSETSHIRE.	
Camelford . . .	Henry III.	Blandford . . .	1348, 22 Edward III.
Fowey . . .	1340, 14 Edward III.	Lyme . . .	1311, 5 Edward II.
Grampound . . .	Edward III.	Poole . . .	1190, 2 Richard I.
Helston . . .	1200, 2 John.	Weymouth and Melcombe . . .	1257, 42 Henry III.
Launceston . . .	1190, 2 Richard I.	DURHAM COUNTY.	
Liskeard . . .	Henry III.	Durham . . .	1189, 1 Richard I.
Lostwithiel . . .	Edward I.	Hartlepole . . .	1200, 2 John.
Looe, East . . .	1340, 14 Edward III.	Warnemuth . . .	1246, 31 Henry III.
Looe, West . . .	1340, 14 Edward III.	ESSEX.	
Newport . . .		Harwich . . .	1343, 17 Edward III.
Penknec . . .	1325, 19 Edward II.	GLOUCESTERSHIRE.	
Penryn . . .	Henry III.	Campden . . .	1248, 33 Henry III.
Polruan . . .	1340, 14 Edward III.	Cirencester . . .	1399, 1 Henry IV.
St. Ives . . .	1558, 1 Elizabeth.	HAMPSHIRE.	
St. Germain's . . .	1562, 5 Elizabeth.	Alresford . . .	1299, 28 Edward I.
St. Mawes . . .	1562, 5 Elizabeth.	Alton . . .	1294, 23 Edward I.
St. Michael's . . .	1564, 7 Edward VI.	Andover . . .	1307, 1 Edward II.
Saltash . . .	Henry III.	Basingstoke . . .	1227, 12 Henry III.
Tregony . . .	1200, 2 John.	Fareham . . .	1305, 34 Edward III.
Truro . . .	Henry II.	Lymington . . .	1535, 27 Elizabeth.
Wainfleet . . .	1340, 14 Edward III.	Newport, Isle of Wight . . .	1294, 23 Edward I.
CUMBERLAND.		Newton, Isle of Wight . . .	1285, 13 Edward I.
Carlisle . . .	Henry III.	Odiham . . .	1203, 5 John.
Cockermouth . . .	1292, 20 Edward I.		
Egremont . . .	1295, 23 Edward I.		
Wigton . . .	Henry III.		

HAMPSHIRE—*continued*.

Overton . . .	1291, 20 Edward I.
Petersfield . . .	1103, 3 Henry I.
Portsmouth . . .	1194, 6 Richard I.
Whitchurch . . .	1199, 1 John.
Yarmouth, Isle of	
Wight . . .	1294, 23 Edward I.

HEREFORDSHIRE.

Bromyard . . .	1359, 33 Edward III.
Ledbury . . .	1359, 33 Edward III.
Leominster . . .	1297, 26 Edward I.
Rosse . . .	1359, 33 Edward III.
Weobley . . .	1297, 26 Edward I.

HERTFORDSHIRE.

Berkhamsted . . .	1340, 14 Edward III.
Storteford . . .	1310, 4 Edward II.

KENT.

Faversham . . .	1381, 30 Edward I.
Greenwich . . .	1557, 4 & 5 Ph. & M.
Tunbridge . . .	1294, 23 Edward I.
Queenborough . . .	1368, 42 Edward III.

LANCASHIRE.

Clitheroe . . .	1329, 3 Edward I.
Lancaster . . .	1193, 5 Richard I.
Liverpool . . .	1200, 2 John
Newton . . .	1558, 1 Elizabeth
Preston . . .	1183, 30 Henry II.
Wigan . . .	1399, 1 Henry IV.

LINCOLNSHIRE.

Boston . . .	1352, 26 Edward III.
Grantham . . .	1200, 2 John
Grimsby . . .	1200, 2 John

MIDDLESEX.

Westminster . . .	1547, 1 Edward VI.
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MONMOUTHSHIRE.

Monmouth . . .	1255, 40 Henry III.
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NORFOLK.

Lynn . . .	1200, 2 John
Bromholm . . .	1228, 13 Henry III.
Castle Rising . . .	1558, 1 Elizabeth

NORTHAMPTONSHIRE.

Brackley . . .	1547, 1 Edward VI.
Higham Ferrers . . .	1554, 1 Ph. & M.
Peterborough . . .	1215, 1 Henry III.

NORTHUMBERLAND.

Bamborough . . .	1260, 45 Henry III.
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NORTHUMBERLAND—*continued*.

Berwick-upon-Tweed	
Corbridge . . .	1200, 2 John
Morpeth . . .	1553, 1 Mary
Newcastle-upon-	
Tyne . . .	1116, 17 Henry I.
Tynemouth . . .	Henry III.

NOTTINGHAM.

Newark . . .	1674, 29 Charles II.
Retford . . .	1275, 4 Edward I.

OXFORDSHIRE.

Banbury . . .	1553, 1 Mary
Chipping Norton . . .	1299, 28 Edward I.
Daddington . . .	1300, 30 Edward I.
University of Ox-	
ford . . .	1603, 1 James I.
Witney . . .	1307, 1 Edward II.
Woodstock . . .	1301, 30 Edward I.
Bureford . . .	1305, 34 Edward I.

SHROPSHIRE.

Bishop's Castle . . .	1572, 15 Elizabeth
Bridgenorth . . .	1220, 11 Henry III.
Burford . . .	1399, 1 Henry IV.
Ludlow . . .	1300, 29 Edward I.
Wenlock . . .	1468, 8 Edward IV.

SOMERSETSHIRE.

Axbridge . . .	1313, 7 Edward II.
Bridgewater . . .	1200, 2 John
Bristol . . .	1164, 10 Henry II.
Chard . . .	1312, 6 Edward II.
Dunster . . .	1360, 34 Edward III.
Glastonbury . . .	1338, 12 Edward III.
Langport . . .	1359, 33 Edward III.
Minehead . . .	1558, 1 Elizabeth
Montacute . . .	1359, 33 Edward III.
Stokegurseay . . .	1360, 34 Edward III.
Watchet . . .	1301, 30 Edward I.
Wells . . .	1200, 2 John
Were . . .	1357, 31 Edward III.

STAFFORDSHIRE.

Litchfield . . .	1310, 4 Edward II.
Newcastle-under-	
Lyne . . .	1215, 17 John.

SUFFOLK.

Aldborough . . .	1570, 13 Elizabeth.
Bury . . .	1297, 26 Edward I.

SUFFOLK—continued.

Lynn	1203, 5 John.
Orford	1297, 20 Edward I.

SURREY.

Bletchingley	1297, 26 Edward I.
Farnham	1310, 4 Edward II.
Gatton	1450, 29 Henry VI.
Guildford	1135, 1 Stephen.
Haslemere	1584, 27 Elizabeth.
Kingston	1199, 1 John.
Ryegate	1297, 26 Edward I.
Southwark	1297, 26 Edward I.

SUSSEX.

Bramber	1297, 26 Edward I.
Grinstead	1307, 1 Edward II.
Horsham	1299, 28 Edward I.
Midhurst	1310, 4 Edward II.
Shoreham	1297, 26 Edward I.

WARWICKSHIRE.

Coventry	1267, 52 Henry III.
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WESTMORELAND.

Appleby	1199, 1 John.
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WILTSHIRE.

Chippenham	Henry III.
Downton	1297, 26 Edward I.
Heytesbury	1449, 28 Henry VI.
Highworth	1298, 26 Edward I.
Hindon	1224, 9 Henry III.
Ludgershall	1313, 7 Edward II.
Marlborough	1200, 2 John.
Mere	1359, 33 Edward III.
Old Sarum	1200, 2 John.
Salisbury	1226, 11 Henry III.

WILTSHIRE—continued.

Westbury	1448, 27 Henry VI.
Wootton Bassett	1446, 25 Henry VI.

WORCESTERSHIRE.

Bewdley	1472, 12 Edward IV.
Bromsgrove	1295, 23 Edward I.
Dudley	1295, 23 Edward I.
Evesham	1295, 23 Edward I.
Kidderminster	1295, 23 Edward I.
Pershore	1295, 23 Edward I.

YORKSHIRE.

Aldbrough	1558, 1 Elizabeth.
Beverley	1121, 22 Henry I.
Boroughbridge	1553, 1 Mary.
Doncaster	1194, 6 Richard I.
Hedon	1200, 2 John.
Hull	1303, 32 Edward I.
Jervaulx	1338, 12 Edward II.
Knaresborough	1200, 2 John.
Malton	1297, 26 Edward I.
North Allerton	1297, 26 Edward I.
Pickering	1199, 1 John.
Pontefract	1297, 26 Edward I.
Ravenser	1328, 2 Edward III.
Richmond	1328, 2 Edward III.
Ripon	1307, 1 Edward II.
Scarborough	1199, 1 John.
Tickhill	1295, 23 Edward I.
Thirsk	1295, 23 Edward I.
Whitby	1199, 1 John.

CINQUE PORTS.

Winchelsea	1190, 2 Richard I.
Rye	1190, 2 Richard I.
Seaford	1291, 20 Edward I.

In the counties of Chester—Derby—Huntingdon—Leicester—and Rutland—there have been no new boroughs created.

III.—BOROUGHES created after WILLIAM I, and before RICHARD I.

BEDFORDSHIRE.—Dunstable.

HAMPSHIRE.—Petersfield.

LANCASHIRE.—Preston.

SURREY.—Guildford.

YORKSHIRE.—Beverley.

NORTHUMBERLAND.—Newcastle-on-Tyne.

IV.—A LIST of the PLACES which were called upon as BOROUGHs, to send BURGESSES to Parliament in 1297, the 26th of EDWARD I., and at subsequent periods.

BEDFORDSHIRE.—Bedford.

CAMBRIDGESHIRE.—Cambridge.

CORNWALL.—Bodmin, Helston, Truro, Launceston.

DERBYSHIRE.—Derby.

DEVONSHIRE.—Ashburton, Barnstaple, Dartmouth, Exeter, Plympton, Plymouth, Totness.

DORSETSHIRE.—Bridport, Dorchester, Shaftesbury.

ESSEX.—Colchester.

HEREFORD.—Leominster, Weobley.

HERTFORD.—Hertford.

GLOUCESTERSHIRE.—Gloucester.

HAMPSHIRE.—Portsmouth, Southampton, Winchester.

HUNTINGDON.—Huntingdon.

KENT.—Canterbury, Rochester.

LANCASHIRE.—Lancaster, Preston.

LINCOLNSHIRE.—Stamford, Grimsby.

MIDDLESEX.—London.

NORTHAMPTON.—Northampton.

NORTHUMBERLAND.—Newcastle-on-Tyne.

NORFOLK.—Lynn, Yarmouth, Norwich.

NOTTINGHAMSHIRE.—Nottingham.

OXFORDSHIRE.—Oxford.

SALOP.—Bridgenorth, Shrewsbury.

SOMERSET.—Bristol, Bath, Bridgewater, Ilchester, Taunton, Wells.

SUFFOLK.—Bury, Ipswich, Orford.

SURREY.—Bletchingley, Guildford, Rygate, Southwark.

SUSSEX.—Bramber, Chichester, Lewes, Seaford, Shoreham.

WARWICKSHIRE.—Coventry, Warwick.

WESTMORELAND.—Appleby.

WILTSHIRE.—Chippenham, Devizes, Downton, Malmesbury, New Sarum.

WORCESTERSHIRE.—Droitwich, Worcester.

YORKSHIRE.—Malton, Beverley, North Allerton, Pontefract, Scarborough, York.

28 EDWARD I.

Amersham, St. Alban's, Alresford, Calne, Chipping Norton, Hereford, Heyteebury, Honiton, Horsham, Leicester, Marlborough, Marlow, Milbourn Port, Okehampton, Stafford, Wendover, Wycombe, Wylton.

29 EDWARD I.

Reading.

30 EDWARD I.

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Will. IV. the *Commission* which his majesty was advised to issue for the purpose of obtaining information respecting the condition of the municipal corporations in the country.

Serious doubts were entertained by many, best informed upon these subjects, as to the legality of the commission.*

Prerogative.

That the king, by virtue of his prerogative, is enabled, as a part of the executive functions of the crown—and constitutionally speaking, is bound—to superintend the due execution of the law in the several municipal institutions of the country, cannot be doubted. And that for such purposes, an *oath* might perhaps be ordered to be administered, in order to obtain the most correct information. But whether the crown can with propriety investigate the finances—or inquire into the property of the corporations—who are its grantees—is a question involved in great and serious difficulties. The cases cited in the note, may supply the curious reader with the means of investigating that point, if it should be thought necessary.

Oath.

But comparatively speaking, it is now become of little importance. The commission has executed its functions: and the generality of the corporations, much to their credit, and consistently with their honour, have submitted to an investigation which has in most instances relieved them from suspicion and jealousy.

The public wait the result of the inquiries of the learned commissioners.

Whatever may have been the question respecting the legality of the commission, its fruits only now remain to be received.

If the inquiry should have led to a full investigation of the history of all the municipal institutions, and tracing them from their earliest origin, should have pursued them through their course of good and evil; and distinguishing their rights from their usurpations, should afford the Legislature the means

* 1 Bl. Com. 280; 1 Inst. 96 a; F. N. B., p. 262; F. N. B., 111 d; F. N. B., 114 c; 4 Inst., cap. 28, p. 162; Stat. Westm. 2, cap. 29, 13 Edward I.; Stat. 24. Edward III.; 2 Inst., p. 50, 18 Edward III.; Stat. 2, cap. 1; 2 Inst. 479; 2 Inst. 48.

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COMMISSION.

But the former and correcting the latter, the public
indebted if a debt of gratitude to those who have effected so
ate of upon the indiscreet zeal of party feeling shall have ob-
ances, the corporations, or the past application of their
port, so as to have induced them to embody in their
r to local prejudices and jealousies—such a course may go
ayed counteract that conciliatory spirit so generally dis-
olds forth the strongest guarantee for their co-operation in
e reform of their abuses—an object so essential to the
ermanent interests of the bodies themselves and the com-
unity at large. That all may unite in so desirable an effort is fervently
That all may unite in so desirable an effort is fervently
be wished. The course to be pursued is plain and
vious. Every means should be adopted to uphold and
aintain, with general concurrence, the authority and govern-
ent of the *local jurisdictions* of the boroughs: and to abate,
th unsparing vigour and honest determination, every abuse
d usurpation.

THE END.

ERRATA, VOL. III.

- Page 1475, note, for "in," read "to."
 — 1478, line 27, for "from," read "four."
 — 1515, — 8, dele "to."
 — 1528, — 12, for "council," read "counsel."
 — 1535, — 31, for "his case," read "it."
 — 1546, — 31, dele "which is."
 — 1547, — 8, dele "which were."
 — 1561, — 32, dele "at law."
 — 1564, note, add "1235—Stockbridge."
 — 1574, line 15, for "voters," read "burgesses."
 — 1575, — 24, insert "this."
 — 1579, — 13, dele "of corporations."
 — 1623, — 33, for "then," read "than."
 — 1627, — 8, for "their," read "the."
 — 1627, — 11, for "judgment," read "votes," and add,
 "of the electors."
 — 1627, — 15, for "for," read "that."
 — 1627, — 15, dele "to."
 — 1627, — 15, for "have," read "had."
 — 1627, — 25, for "might," read "was."
 — 1627, — 26, for "otherwise have been," read "either,"
 — 1627, — 26, dele "for him."
 — 1627, — 27, for "at this period," read "now."
 — 1627, — 29, dele "now."
 — 1643, — 24, for "never," read "ever."
 — 1975, note, for "Dr.," read "Dean."

IN INDEX.

Insert, ANNE, A. D. 1702—1714.

reign of, 1943—1980

charters granted, 1949

Page 2311, transpose references to *Apprentices, Boroughs, &c.* post.
 Corporations.

— 2319, DUNGANNON, transpose "case of," *et seq.* from Dunstable.

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